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# Supreme Court of the United States

OCTOBER TERM, 1936.

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**No. 325.**

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MORLEY CONSTRUCTION COMPANY, A CORPORATION, AND MERCHANTS BANK OF KANSAS CITY, MISSOURI, A CORPORATION, PETITIONERS,

VS.

MARYLAND CASUALTY COMPANY, A CORPORATION, RESPONDENT.

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ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

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## BRIEF FOR PETITIONERS.

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VS.

MARYLAND CASUALTY COMPANY, A CORPORATION, RESPONDENT.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

## BRIEF FOR PETITIONERS.

### STATEMENT OF THE CASE.

Morley Construction Company, a corporation, entered into a contract with the United States Government to construct a veterans hospital in the vicinity of Batavia, New York for the sum of $540,000.00. The Maryland

Casualty Company, a corporation, and surety company, with the construction company, executed the performance bond (standard form), of $275,000.00 on July 28, 1932.

Morley Construction Company immediately engaged in the performance of the work. Thereafter due to labor troubles and the general banking situation early in 1933 and the failure of subcontractors to perform their contracts and its financial condition the construction company could not proceed with the work. Thereupon and on the 28th day of April, 1933, officials of Morley Construction Company met with the Maryland Casualty Company's officials at Buffalo, New York, and entered into a contract to open a joint account which contract consisted of three documents all executed at the same time (Rec. 75). These documents consist of Exhibits "A" (Rec. 10), "B" (Rec. 12) and Defendant's Exhibit 3 (Rec. 77-78). By the contract as expressed in these documents the surety company and its principal agreed that Morley Construction Company would open an account in a bank known as the M. & T. Trust Company, of Buffalo, New York, each depositing the sum of five thousand ($5,000.00) dollars to open it; that the construction company would deposit thereafter all moneys and estimate checks received from the government because of said work in said joint account and that the Maryland Casualty Company and the construction company would jointly own all sums deposited in said account (Rec. 77-78). It was also agreed that all checks on said joint account drawn by the construction company should be countersigned by the surety company's representatives (Rec. 11). It was also agreed that the surety company should (in addition to the initial

deposit) deposit a sufficient sum of money to pay off all plasterers' claims unpaid and sufficient money to complete the plastering contract (see Bill of Complaint, pp. 3-4).

On June 21, 1933, the parties modified the agreement contained in Exhibits "A" and "B" and Defendant's Exhibit 3. The parties then changed the account to a joint account in the names of H. F. Morley and the Maryland Casualty Company. The original account was that of the Morley Construction Company alone, with a countersignature (Rec. 98, 100-A-100-B).

The Morley Construction Company thereafter proceeded with the work, completed the building, made a final settlement with the government on November 9, 1933 (Rec. 95). The Maryland Casualty Company failed to deposit in the joint account sufficient money to complete the plastering contract as agreed by it (Rec. 80-124). The agreed amount was $17,689.29 (Rec. 116) and the amount deposited for plastering contract purposes was $5,700.00 (Rec. 4).

After the completion of the building Morley Construction Company and its officials left New York state and went to Kansas City, Missouri, their home. The balance found to be due by the final settlement, amounting to $59,780.82 (Rec. 19), a check or voucher for said amount was sent to the construction company by the government and said voucher was given by the president of the construction company to petitioner, Merchants Bank of Kansas City, for the purpose of collection under an understanding that when collected the president (as trustee) should receive a cashier's check for the amount

The voucher was deposited by the Merchants Bank in the Federal Reserve Bank, but before it was paid the casualty company filed a suit in the Supreme Court of the District of Columbia and caused process to be served on the Treasurer of the United States and an order to show cause made by said court on receipt of which the Treasurer refused to pay the amount of the check or voucher. Two days afterwards and on the 27th day of November, 1933, the Maryland Casualty Company filed its bill of complaint in the United States District Court at Kansas City, and later on March 3, 1933, filed an amended bill of complaint in the United States District Court at Kansas City, Missouri (Rec. 1), in which it asked for the relief of specific performance of the contract entered into in April, 1933, between the parties and also subrogation and exoneration as surety.

In the bill of complaint the casualty company claimed that the construction company and its officers intended to use the proceeds of the voucher due from the government for purposes other than paying labor and material claims and that they intended to conceal or fraudulently convey the same (Rec. 8).

Petitioners filed their joint and separate motion to dismiss answer and counterclaim on January 5, 1934, and refiled same on September 27, 1934 (Rec. 14-30). The motion to dismiss was made on the grounds that the complaint in equity failed to state facts sufficient to constitute a cause of action or basis for relief against the defendants, or either of them.

The answer also alleged that Maryland Casualty Company had breached its alleged contract and forfeited

all rights thereunder to have the amount of the voucher thereunder deposited and called attention to the failure of the bill of complaint to allege performance of the contract which the Maryland Casualty Company sought to have enforced and denied that the claim of the construction company for the amount due from the government was or could be impressed with a lien or trust in favor of the Maryland Casualty Company. Also pointed out that the time given by the statute for the performance of the obligations of the contract and bond to pay laborers and materialmen had not expired when the suits were brought by the Maryland Casualty Company and that its acts prevented the construction company from collecting its obligations and paying its debts (Rec. 22-23). The counterclaim prayed that the court direct the casualty company to dismiss its suit in the Supreme Court in the District of Columbia (Rec. 23-24).

The Maryland Casualty Company filed a reply on September 18, 1934 (Rec. 37), and an answer to the counterclaim. In said reply, amongst other things, the Maryland Casualty Company alleged:

> "• • • that the sole purpose of plaintiff's complaint is to require the defendants to deposit said money and to require its disbursement in accordance with said alleged contract" (Rec. 35).

The cause was called for trial on September 27, 1934, by the district court (Rec. 57). At the trial Maryland Casualty Company called the president of defendant construction company to the stand and his testimony established that the total amount of the assets over the

obligations of Morley Construction Company was $23,598.84; that some of the assets consisted of claims against the defaulting bonding companies of subcontractors; that the construction company had two claims against the New Amsterdam Casualty Company, one amounting to $19,919.11 and the other in the amount of $532.83; a claim against the Standard Accident Company in the amount of $521.00 and against the National Surety Company in the amount of $20,689.29 (Rec. 73-74). The total amount of claims to be collected amounted to $42,791.23. The construction company desired to be permitted to collect those claims and to collect the amount due from the government in addition, amounting to $59,780.82.

The evidence disclosed without contradiction that the construction company was endeavoring to complete its contract to pay the laborers and materialmen, as it had completed the contract to the satisfaction of the government with reference to that feature of the contract and that the acts of Maryland Casualty Company in bringing the suits in question had prevented it from collecting its debts and discharging its obligations. After hearing the evidence the trial court filed a memorandum opinion, findings of fact, conclusions of law and indicated decree (Rec. 120-125). The court found that:

> "While it was not the intention of the construction company nor its officers, when the bill was filed, to use the proceeds of the warrant referred to in finding of fact No. 4 for any other purpose than the payment of labor and material claims on the Batavia contract the casualty company had

reason to apprehend that such was their intention" (Rec. 123).

It found also that:

> "The construction company never has received the final payment from the United States of $59,780.82 nor any part of it and cannot receive it until the restraining order issued by the Supreme Court of the District of Columbia is set aside by that court. The casualty company filed its bill in this case after it had filed its bill in the Supreme Court of the District of Columbia" (Rec. 122-123).

The court also found:

> "Pursuant to the agreement all money which the construction company received from the United States under the contract, except the final payment of $59,780.82, were deposited in the joint account" (Rec. 122).

The court further found that it was provided by the written agreement that Maryland Casualty Company would advance to the construction company and deposit in the said joint account a sufficient sum of money to pay off all plasterers' claims unpaid and a further sufficient sum of money to complete the plastering (Rec. 121). The court also found that the time at which suits might be independently filed against Maryland Casualty Company, as surety for the construction company, on account of claims for unpaid labor and material bills

> "* * * had not yet arrived when the bill was filed" (Rec. 123).

The court further found:

> "The casualty company did not itself discharge all of its obligations under that agreement" (Rec. 124).

Thereupon the court adjudged that Maryland Casualty Company was not entitled to a decree of specific performance or to the relief of subrogation (Rec. 124). It filed conclusions of law to this effect (Rec. 125). It found that the construction company was insolvent when the bill of complaint was filed and the contract made but not at the time of trial (Rec. 110; Rec. 123). It, however, found that the Maryland Casualty Company was entitled to the relief of exoneration by defendant construction company. It found that the cross bill should be dismissed (Rec. 125). A decree was thereafter entered of record giving effect to these findings of fact and conclusions of law (Rec. 37-39). This decree required the construction company to deposit the proceeds of the voucher, to-wit: $59,780.82, in some bank and to be designated a special trust fund for the payment of labor and materials on the Batavia contract, and to use:

> "All other assets of defendant, Morley Construction Company, which it now has or may hereafter acquire"

for the payment of the labor and material claims on the Batavia contract. An appeal from the decree was taken to the United States Circuit Court of Appeals for the Eighth Circuit (Rec. 52). The cause was argued on May 6th in that court and on the 22nd of June, 1936, the court filed an opinion (Rec. 126-138), together with its decree (Rec. 138-139), in which it directed that the cause be remanded to the district court with directions for modification of the decree in ac-

cordance with the views expressed in the opinion of the court and as so modified the decree was affirmed.

The opinion of the court discloses that notwithstanding the trial court found against Maryland Casualty Company on the issue with reference to specific performance and that that company had failed to prosecute an appeal or cross appeal from the decision against it and had failed to assign cross errors and that Maryland Casualty Company had breached the contract it sought to have performed, yet the court of appeals held that the district court was in error in denying the relief of specific performance and that it should have granted the relief of specific performance and in the opinion directed that the cause be remanded and the relief of specific performance granted to Maryland Casualty Company by the district court on remand. The court of appeals also found that the trial court erred in granting the relief of exoneration to the surety upon the ground that it was not liable at the time the bill was filed and consequently was not entitled to the relief of exoneration.

Thereafter, and in due time, to-wit: on July 7, 1936, petitioners filed a petition for rehearing (Rec. 139). Thereafter, and on July 20th, said petition for rehearing was denied (Rec. 139). Thereafter, the motion for stay of issuance of mandate was filed (Rec. 139-140) on July 30, 1936, and on August 3, 1936, an order staying the issuance of the mandate was made for thirty days. On October 12, 1936, this court granted certiorari herein and the cause is here pending for

disposition pursuant to order granting same. It appears from a motion just filed herein and a copy of an opinion marked Exhibit "A" thereto attached that an action was brought in the United States Court for the Western District of New York on the performance bond after Maryland Casualty Company had caused the assets of the construction company to be impounded in effect; that Maryland Casualty Company obtained a judgment therein for approximately $66,000.00 against Morley Construction Company on December 14, 1936, that it opposed the motion of the construction company to stay execution thereon pending the disposition of this cause; that said court ordered that if the construction company would deposit with its clerk security in the sum of $112,000.00 execution could be stayed; that the decree (Rec. 37-39) herein prevents the construction company from using any of its resources for said purpose; that unless execution be stayed this court will be deprived of jurisdiction and power to adjudicate the rights of the parties herein and that under Section 377, Title 28, U. S. C., and its inherent power orders staying execution and issuing necessary writs should be granted.

## SPECIFICATION OF ERRORS.

1. The circuit court of appeals erred in holding that the judge of the district court should have granted the relief of specific performance to appellee and this notwithstanding it appeared that the appellee was satisfied with the decision against it on the issue of specific performance and failed to appeal from the said decision and failed to assign cross errors.

2. The circuit court of appeals erred in holding that notwithstanding the bill of complaint of appellee failed to allege that it had performed the contract on its part which it sought to have enforced, yet the circuit court of appeals held in its opinion that the trial court had jurisdiction to grant the relief of specific performance notwithstanding the said omission in the petition.

3. The court of appeals erred in holding that the trial court properly overruled petitioners' motion to dismiss the bill of complaint.

4. The court of appeals erred in holding that notwithstanding the record shows that appellee failed to deposit even one-half of the amount it agreed to deposit in the joint account, yet that by depositing less than one-half of the amount agreed to be deposited the appellee had substantially performed its contract.

5. The court erred in holding that notwithstanding it found and the record disclosed that petitioner had repeatedly requested the appellee to perform its contract

and that it had refused to do so, yet that because petitioner did not again make a request which had been theretofore denied and declined that it had thereby modified or agreed to a modification of the contract on which the bill of complaint was founded.

6. The court erred in that it held contrary to the decisions of this court and contrary to the law governing it that notwithstanding the pleadings and the evidence disclosed that the Maryland Casualty Company had deliberately and intentionally breached its contract and also its surety contract and failed to comply with petitioners' request to perform it that yet respondent was entitled to the relief of specific performance, notwithstanding respondent had waived any right to complain of error in the court of appeals by failing to appeal from the decision on the point against it.

7. The court of appeals erred in holding that the Maryland Casualty Company and the Morley Construction Company made a contract which would operate to give the Maryland Casualty Company a right to have a legal or equitable interest in a claim of the petitioner against the United States, notwithstanding Section 203, Title 31, U. S. C. A., same being R. S. 3477, prohibited any transfer or assignment of any reason, legal or equitable, in any claim against the government.

8. The court of appeals erred in that notwithstanding it appeared from the pleadings and the evidence and the findings of the court below and the findings of the trial court and also the findings of the circuit court of

appeals, that the contract sought to be enforced was a contract which was made by the parties in violation of the express terms of the statute, to-wit: Section 203, Title 31, U. S. C. A., and notwithstanding it appeared that even if Exhibit "A" had been a lawful contract that the appellee had failed to perform the obligations thereof on its part and thus and thereby violated it and forfeited any rights thereunder and notwithstanding respondent, Maryland Casualty Company, had failed to appeal from the decision on the issue of specific performance against it or on any issue and was satisfied with the decree of the trial court, yet the circuit court of appeals transcended in the extent and character of its decision and judgment the law which was applicable to the case and to the court of appeals and to the record before it.

## SUMMARY OF THE ARGUMENT.

I.

The bill of complaint (Par. 18, Rec. 8) was based upon the theory that the casualty company though it had not performed the contract it sought to have enforced had *good* reason to believe that the construction company intended to make a fraudulent conveyance of the proceeds of the final voucher from the government to defraud creditors (Rec. 8). Finding of Fact 7 by the trial court found that the construction company and its officers did not intend to use said proceeds for any other purpose than the payment of labor and material claims and that the apprehension of the casualty company was not based on a *good* reason but merely upon suspicion. The circuit court of appeals stated that there were facts which led the casualty company to believe the Morley Construction Company did not intend to use the funds coming from the United States Government in the payment for labor and materials used on the construction contract (Rec. 134). In so doing the circuit court of appeals, in undertaking to try the case *de novo* and contrary to the facts in the record and found by the trial court, violated the rule formulated by this court in *Adamson* v. *Gilliland,* 242 U. S. 350, holding that the findings of fact based on oral evidence by the trial judge are unassailable, and therefore the opinion of the court of appeals herein conflicts with said opinion of this court, and with the law as declared by all the other cir-

cuit courts of appeals on the question. See *Fidelity Phenix Fire Ins. Co.* v. *Benedict,* 64 F. 347 (C. C. A. 4).

The Court of Appeals for the Fourth Circuit expressly holds in said case that cases in equity on appeal are not tried *de novo.*

II.

The fact that the construction company's entire assets were tied up by the decrees of the courts below and by the suits in the District of Columbia and Kansas City brought by the Maryland Casualty Company nearly six months before its liability could accrue on the performance bond caused a loss to the Morley Construction Company in excess of forty-two thousand ($42,000.00) dollars by preventing it from realizing on its claims against the bonding companies of subcontractors and others and in effect deprived it of its property contrary to the command of the fifth amendment and it was unjust and inequitable under all the authorities and unless the construction company can get relief in this court it will sustain such a total loss. *Fidelity & Deposit Company* v. *Buckley,* 75 N. H. 506; *Willard* v. *Tayloe,* 8 Wall. 557.

III.

The contract consisting of the three instruments executed on April 28, 1933, Exhibits "A," "B" and Defendant's Exhibit 3 (Rec. 77; 78), was a contract by virtue of which the Maryland Casualty Company sought to acquire by transfer or assignment an interest in a claim against the government in violation of Section 203, Title 31, U. S.

C. A. As the contract was illegal and void it cannot be enforced and the opinion and decision of the court of appeals conflict with the following opinions of this court:

*National Bank of Commerce* v. *Downie*, 218 U. S. 345, 54 L. Ed. 1065.

*Spofford* v. *Kirk*, 97 U. S. 484, 24 L. Ed. 1032.

*American Surety Co.* v. *U. S.*, 76 Miss. 289, 24 So. 388.

*U. S.* v. *Gillis*, 95 U. S. 407, 24 L. Ed. 503.

IV.

As the contract of April, 1933, was in violation of Section 203, Title 31, U. S. C. A., prohibiting transfers and assignments of claims upon the United States, the opinion and decision of the Circuit Court of Appeals for the Eighth Circuit is in conflict with the following opinions and decisions of the circuit courts of appeal for other circuits and of many state courts in the following cases:

*In re Hudford Co. of N. Y.*, 257 Fed. 722.

*Levison* v. *Ill. Surety Co.*, 222 N. Y. 280. 118 N. E. 641.

*Weyerhaeuser Timber Co.* v. *First National Bank of Portland*, 43 Pac. (2d) 1078.

*Packard Motor Car Co.* v. *U. S.*, 59 Court of Claims 354.

*In re Cargo of Intoxicating Liquors*, 40 F. (2d) 72.

*H. M. O. Lumber Co.* v. *U. S.*, 40 F. (2d) 544.

*Dalton Foundaries, Inc.*, v. *U. S.*, 56 F. (2d) 483.

V.

The decision of the trial court based on the evidence of witnesses for both parties was against Maryland

Casualty Company on the issue of specific performance. Maryland Casualty Company did not appeal from said decision, nor assign cross errors and hence the court of appeals was without jurisdiction to reverse the decree of the trial court denying specific performance and to modify same by directing that the relief of specific performance be granted and the decision of the circuit court of appeals is in conflict with the following opinions of this court and the general law on that question:

*The Maria Martin,* 12 Wall. 37.
*Peoria & P. N. R. Co.* v. *U. S.,* 263 U. S. 528.
*Bolles* v. *Outing Co.,* 175 U. S. 562.
2 Rul. Cas. L. 156.
*U. S.* v. *Am. Exp. Co.,* 265 U. S. 125.
*Cherokee Nation* v. *Black Feather,* 155 U. S. 528.
*Bothewell* v. *U. S.,* 254 U. S. 231.
*Terminal R. Asso.* v. *U. S.,* 266 U. S. 17.
*Clory* v. *Foundry Co.,* 132 U. S. 612.

VI.

The jurisdiction of the circuit court of appeals is exclusively appellate. It had, therefore, no jurisdiction to reverse the action of the trial court in denying the relief of specific performance to the appellee since the appellee had not appealed and its decision and opinion on that point is in conflict with the following decisions of said and other circuit court of appeals on the same question:

*O'Neil* v. *Mining Co.,* 174 Fed. 527, l. c. 535 (C. C. A. 8).
*Rogers* v. *Mining Co.,* (C. C. A. 8) 154 Fed. 606.
*Morrison* v. *Burnette,* (C. C. A. 8) 154 Fed. 617.

*Midland Valley Ry. Co.* v. *Fulgham,* (C. C. A. 8) 181 Fed. 91.

*National Fire Ins. Co.* v. *Elliott,* (C. C. A. 8) 7 F. (2d) 522.

*Milward* v. *Vulcan Furnace Co.,* (C. C. A. 3) 26 F. (2d) 78.

*Swger* v. *Smith,* (C. C. A. 4) 194 Fed. 762, l. c. 765.

*Backhurst* v. *Johnson,* (C. C. A. 8) 72 F. (2d) 644.

*Merchant's S. Co.* v. *Johnson,* 69 F. (2d) 940.

*Jones Store Co.* v. *Dear,* 56 F. (2d) 996.

*Alexander* v. *Cosden Co.,* 290 U. S. 484, l. c. 487.

VII.

The facts stated in the opinion of the court of appeals alone discloses that Morley Construction Company had repeatedly requested the Maryland Casualty Company to perform its contract to place enough money in the joint account to complete the plastering contract and that Maryland Casualty Company refused so to do and there is nothing in the record, nor in the opinion of the court of appeals, that warrants any inference that there was a modification of the contract or any acquiescence in such modification on the part of the Morley Construction Company. The very opinions cited by the court of appeals on the question of acquiescence, to-wit:

*Becker* v. *Becker,* 250 Ill. 117, 95 N. E. 70;

*Langley* v. *Devlin,* 95 Wash. 171, 163 Pac. 395 (Rec. 126);

are not opinions which justify its conclusion with reference to acquiescence and its conclusion that the construc-

tion company acquiesced in a breach or modification of the contract by the Maryland Casualty Company is wholly unjustified and is merely an arbitrary and capricious decision of the circuit court of appeals.

VIII.

The opinion of the court of appeals holding that the contract could be enforced conflicts with the opinions of this court.

*Cathcart* v. *Robinson,* 5 Peters 264.
*Rutland Marble Co.* v. *Ripley,* 10 Wall. 339.
*Dorsey* v. *Packwood,* 12 How. 126.
*Morgan* v. *Morgan,* 2 Wheaton 290.

This for the reason that Morley Construction Company could not have any relief in equity against the Maryland Casualty Company at the time said company filed its bill to compel it to deposit enough to complete the plastering contract. That entire burden was cast upon the construction company and the fact that the casualty company failed to pay the money was in itself absolute proof of the damage and injury sustained by the construction company.

IX.

The act of the respondent in tying up the proceeds of the voucher was an act in conflict with the duty of Maryland Casualty Company as surety and amounted to a breach of its contract of suretyship and hence it was not entitled to any relief for the reason that its wrongful conduct has compelled a breach of the performance bond (*S. W. Surety & Ins. Co.* v. *Wells,* 217 Fed. 294; *McElroy*

v. *Hathaway,* 6 N. W. 876, per Cooley, J.; *American Bonding Company* v. *Logansport & W. Valley Gas Co.,* 95 Fed. 96).

X.

The bill of complaint sought the enforcement of the contract in writing marked Exhibit "A" by virtue of which Morley Construction Company was to open an account. According to the tenor of Exhibit "A" the account was to be the account of Morley Construction Company, subject to the joint control of the parties. This is the contract sought to be enforced but Defendant's Exhibit 3, dated April 29, 1933, modified Exhibit "A" by providing that the moneys should be the joint property of Morley Construction Company and Maryland Casualty Company and that the account should be in all respects a joint account. It was stated that this agreement was made on the same day as the other agreement (Rec. 75). It further appears that there was a further modification of the contract to the effect that on June 21, 1933, to a joint account in the name of H. F. Morley and the Maryland Casualty Company. Exhibit 3 (Rec. 77-78) and the modification changing the names of the parties to the account and providing that it should be the joint property of the parties amounted to a modification and change of the contract sought to be enforced and deprived the court of jurisdiction to enforce it (see Rec. 98 and exhibits at Rec. 100A-100B).

XI.

Notwithstanding the allegation in the bill of complaint that property within the jurisdiction of the Dis-

trict Court of the United States for the Western District of Missouri was involved, yet the evidence disclosed that the only property involved was the amount of the voucher which the Treasurer of the United States refused to pay and this fact is conclusively admitted by respondent's reply brief. It, therefore, follows that there was no property within the jurisdiction of the district court to which the jurisdiction of said court as a court of equity could attach and since some of the acts to be performed with reference to property beyond the jurisdiction of the district court were acts of the M. & T. Trust Company and its employees who were not parties, the district court was without jurisdiction to grant the decree of specific performance under the general law well stated in *Alexander* v. *Hamilton*, 287 Fed. 508.

XII.

The pleadings and the evidence disclosed that the M. & T. Trust Company of Buffalo, New York, was not a party to the suit in the courts below, nor were the representatives of the respondent specified in Exhibit "A," and in view of the fact that said M. & T. Trust Company and said Kelly and Schaus must exercise their discretion in the performance of their duties with reference to disbursement of the funds and as the district court has no jurisdiction to superintend the disbursement of the fund, it follows that it has no jurisdiction to render a decree impounding the fund and placing it under the control of parties over whom the district court had no control and that the decision of the district court undertakes to compel it

to do that which it is without jurisdiction to do. *Alexander* v. *Hamilton,* 287 Fed. 508; *Moore* v. *Toplif,* 107 Ill. 241; 58 C. J. 1141; 50 C. J. 245.

XIII.

The mere fact that the Maryland Casualty Company was a surety for the construction company did not give it any right to interfere with the contractor's right to use the money or checks received by it from the United States in any manner that it saw fit prior to the day on which the liability of the surety company attached, or six months after the final settlement. *Kane et al.* v. *First National Bank of El Paso, Texas,* 56 F. (2d) 534.

XIV.

Under the construction given to the statute giving this court jurisdiction on certiorari to review decisions of the circuit courts of appeals, as stated by Justice Brewer in *Forsyth* v. *Hammond,* 166 U. S. 506, to-wit:

> "Nine separate appellate tribunals might by their difference of opinion, unless held in check by the reviewing power of this court, create an unfortunate confusion in respect to the rules of federal decision."

And, as stated by Chief Justice Taft in *Magnum* v. *Coty,* 262 U. S. 159, it is said:

> "The jurisdiction to bring up cases by certiorari from the circuit courts of appeals was given

for two purposes, first to secure uniformity of decision between those courts in the nine circuits, and second, to bring up cases involving questions of importance which it is in the public interest to have decided by this court of last resort."

And as stated in Rule 38 of this court, this is a case peculiarly calling for the exercise of the discretion vested in this court by the statute to issue the writ prayed for.

XV.

It appears from the opinions reported in *U. S. for Use of Johnson* v. *Morley Construction Co. et al.*, 11 F. Supp. 841; *S. C.*, 12 F. Supp. 1017, that Maryland Casualty Company judicially admitted in the action on the performance bond filed in the District Court for the Western District of New York that the claims of the construction company against the subcontractors or materialmen were valid by itself unsuccessfully seeking to have the claims enforced in that action. Not only that but so firmly did Maryland Casualty Company believe in their validity that while it caused the court of the Western Missouri District on its affidavits and representations made in November, 1933, to find that the construction company was insolvent yet to escape the defense of laches in the New York court it filed affidavits as to insolvency and that the Maryland Casualty Company first learned of the insolvency after this case was tried and in November, 1934.

In seeking to get relief on the ground of insolvency of the construction company in different courts respondent's conduct comes within the rule stated by Judge Faris later of the circuit federal court in writing the opinion in *Ogden* v. *Auer*, 184 S. W. 72, thus:

> "For equity ought not to aid those who urge as grounds for one and the selfsame judgment (of insolvency) positions so glaringly contradictory as to evince from the simple recital of them a lack of candor and clean hands, to say no more."

## ARGUMENT.

### I.

**The basis of the suit was merely a suspicion on the part of the Maryland Casualty Company that Morley Construction Company would use the proceeds of the final voucher for purposes other than the payment for labor and materials, hence the finding of the circuit court of appeals on the issue of specific performance is in conflict with the general rule of law on the proposition that no judgment, decree or conviction can rest upon suspicion.**

The basis of the suit in the trial court was the unfounded fear of the Maryland Casualty Company that the construction company was about to convert its own money to its own use for purposes other than to pay its obligations for labor and material on the Batavia contract. This is established by finding of fact No. 7, as follows:

> "While it was not the intention of the construction company nor its officers, when the bill was filed, to use the proceeds of the warrant referred to in finding of fact No. 4 for any other purpose than the payment of labor and material claims on the Batavia contract, the casualty company had reason to apprehend that such was their intention" (Rec. 123).

In other words, Judge Otis, in that accurate use of language for which he is noted, finds that the basis of the suit was unfounded suspicion or baseless and perhaps effeminate fears. The bill of complaint states that plaintiff has *good* reason to believe, etc. (Rec. 8).

It was at least a condition precedent to the finding of a decree for the casualty company on the issue of specific performance, not only that the casualty company had reason to apprehend the alleged intention, but that said reason was founded upon facts and not upon mistake, speculation or suspicion, and so the trial judge omits the use of the adjective "good" in his finding. And the fact that the trial judge finds that it was not the intention of the construction company nor its officers, when the bill was filed, to use the proceeds of the warrant for any other purpose than the payment of labor and material claims on the Batavia contract, in itself, establishes that the Maryland Casualty Company had no *good* reason for their apprehension, and that they were merely afraid without any *good* reason that the construction company intended to misuse their own funds. In 4 C. J., page 1411, the word "apprehensive" is thus defined: "Suspicious or fearful of something," citing *Golding* v. *Waterhouse*, 16 N. B. 313, 319. In 2 C. J. 395, the word "afraid" is thus defined: "Impressed with fear or apprehension; fearful." It was in this sense that Judge Otis used that word "apprehend" in finding of fact No. 7. As so used the word was synonymous with fear or suspicion. In *Knisely* v. *British American Insurance Company*, 32 Ont. 376, it is held that in construing the words, "Is there any incendiary danger threatened or *apprehended?*" "If the applicant at the time of making the application really does *apprehend* danger, the company is entitled to know that it is *apprehended* so that if desired inquiry may be made as to the grounds of apprehension and the obligation to answer truthfully is bind-

ing whether the grounds are reasonable or unreasonable." In *Baker* v. *State,* 49 Ala. 350, a statute was involved which permitted the carrying of weapons where any person has *"good"* reason to apprehend an attack. Held that the court properly refused to charge the jury, that if they believe from the evidence that defendant had reason to apprehend an attack they must acquit him since the statutory phrase is much more restricted in meaning than the words of the refused charge. From the foregoing it appears that courts and legislatures contemplate that the words "reason to apprehend" do not mean a *good* or *valid* reason. They merely denote a fear or suspicion which may or may not be *good.* Since the words in finding of fact No. 7 are "had reason to apprehend that such was their intention," it necessarily follows that if a *"good* reason to apprehend" could have constituted a jurisdictional basis for granting the relief of specific performance, yet the trial court did not make such finding. In the concrete sense, therefore, the finding is simply that this litigation is based upon speculation and suspicion. It is well settled that suspicion can never be the basis of a judgment in an action at law, a decree in a suit in equity, or a conviction in a criminal case. The finding of fact by the trial judge as to the lack of intention on the part of the construction company to make a fraudulent conveyance of its property was based on the uncontradicted evidence in the case. There was nothing in the record to justify a contrary finding by the circuit court of appeals.

In that opinion the circuit court of appeals said:

> "There were facts which led the Casualty Company to believe the Morley Construction Company did not intend to use the funds coming from the United States Government in the payment for labor and materials used on the construction contract" (Rec. 134).

But the opinion does not specify any fact on which the said conclusion is based. Said opinion ignores the finding of fact on this question by the trial judge, which is that:

> "* * * it was not the intention of the Construction Company nor its officers, when the bill was filed, to use the proceeds of the warrant referred to in finding of fact No. 4 for any other purpose than the payment of labor and material claims on the Batavia contract" (Rec. 123).

This finding was based on the evidence of the witnesses for both parties. Herbert Morley, a witness for the casualty company, testified that he intended to use "the proceeds of the check from the United States Government" in the payment of labor and material bills (Rec. 85). There was evidence that at the time of the filing of the bill the Morleys had two other government contracts (Rec. 110), one of which was a Morley Construction Company job at Fort Lyon, Colorado, for $313,000.00 and some odd hundred dollars (Rec. 109, 110), and that they had another at Fort Sill amounting to $215,000.00 or $216,000.00 (Rec. 109). Evidence by Maryland Casualty Company's witness Lebrecht and president of the Merchants Bank was that between the time of trial and the filing of the bill the Morleys had deposited $100,000.00

in the Merchants Bank. The evidence of one of the Morleys, which was brought out by the court, was as follows (Rec. 107, 108):

"The Court: Overruled. What did you have to do with that money, if you received it?

A. Pay the bills on the job. We never had any other intention, but to pay those bills.

A. Your Honor, might I say something at this time to you?

The Court: Yes, sir.

A. I think I can give you my side of the picture or our side of this picture in a very few words. That is, with this $59,000.00, this final payment, and with the money in the joint account in the bank at Buffalo, and with the money that should have been advanced on this plasterers' overage, that is, the Hudson contract and the labor and material to complete that contract, if that money had been advanced, plus the money that we could have made arrangements with the bank to borrow, every bill on that job could have been paid and would have been. But it couldn't be paid if they had the Maryland standing in there supervising everything, and if we made a deal with somebody and say we will pay you this much, we want to be able to get a check and get a release in full from that job."

* * * * * * *

"The witness testified that claims had been settled on the basis of 60¢ cash on the dollar and giving a note for the balance; that the creditors have given them a release on their job and their claim against the bond. The money was paid out of the joint account at Buffalo and the checks made out and sent to Buffalo, and they were countersigned by Mr. Kelly or somebody in the office and the checks were paid. It was our intention in

the event we were able to recover against the defaulting contractors or their sureties, to eventually pay these notes so that the creditors would be paid in full as that is the only way that we can keep on doing business, to pay those bills."

Defendant construction company sought to prove the amount of its resources from other contracts aggregated over one-half million dollars (Rec. 109), but the trial court declined to accept the proof (Rec. 109, 110), the court saying:

> "The Court: It alleges insolvency as of the date of the filing of the bill."

Respondent's counsel urged, as a reason for the exclusion of the testimony:

> "This job is not a Morley Construction Company job. * * *"

In this the counsel was wrong for the witness said:

> "A. The Fort Lyon job is a job of the Morley Construction Company.
>
> Mr. O'Donnell: Mr. Harris went to great pains to prove how insolvent it was now.
>
> The Court: Some of his questions indicated that, but the evidence was restricted to the date of the filing of his bill, and he said in answer to the court's question that his questions were restricted to that date.
>
> Mr. Ellison: I understand there is no question as to its present solvency then?
>
> The Court: I don't understand that there is" (Rec. 110).

The court of appeals substituted for this evidence adduced by the witnesses for both parties and the physical facts and the finding of the trial court the suspicion of the Maryland Casualty Company. In doing so it ran counter to the rule declared in *Adamson* v. *Gilliland,* 242 U. S. 350, 61 L. Ed. 256, l. c. 357, 358, thus:

> "The case is preeminently one for the application of the practical rule that so far as the finding of the * * * judge who saw the witnesses depends upon conflicting testimony or upon the credibility of witnesses, or so far as there is any testimony consistent with the finding it must be treated as unassailable."

It thus appears that the statement in the opinion of the circuit court of appeals that (Rec. 134):

> "There were facts which led the casualty company to believe the Morley Construction Company did not intend to use the funds coming from the United States Government in the payment for labor and materials used on the construction contract"

is not based on any evidence in the record, and is not based on any findings of fact by the trial judge, but is directly contrary thereto. The finding by the circuit court of appeals that suspicion can constitute the basis of a court decision is in conflict with the law generally. That is to say the circuit court of appeals herein dignified the unfounded suspicions of the casualty company as facts. In a legal sense suspicion is "apprehension of something without proof or slight evidence," *State* v. *Dildine,* Mo. App. 269 S. W. 653, or "imagination of something ill," *United States* v. *Green,* 136 Fed. 618;

*Gulf Oil Company* v. *Shieder*, 30 S. W. 902, 88 Tex. 152; 28 L. R. A. 538; *McCalla* v. *State*, 66 Ga. 346; or "the imagination of the existence of something without proof or upon very slight evidence or upon no evidence," *United States* v. *Green*, 136 Fed. 618; *Gulf Oil Company* v. *Shieder*, 30 S. W. 902, 88 Tex. 152. The essence of a suspicion is that it is without known facts to support it. *Kinstone Cotton Mills* v. *Kuehne*, 130 N. Y. Supp. 779, 129 App. Div. 250. Suspicion implies a belief or opinion as to guilt based upon facts or circumstances which do not amount to proof. *Bushardt* v. *United Investment Company*, 130 S. E. 637, 121 S. C. 324; *Stewart* v. *Farmers Bank*, 117 N. W. 820, 137 Wis. 66. Suspicion is weaker than belief. *Giddens* v. *Mirk*, 4 Ga. 364. Suspicion imports a less degree of certainty than belief. *Humes* v. *Faber*, 1 R. I. 464, 470. Since therefore the Maryland Casualty Company had no *good* reason to fear, suspect or suppose that the construction company would use its money improperly, it was not justified in filing its bill of complaint in the United States District Court for the Western District of Missouri; nor was it justified in doing likewise in the Supreme Court of the District of Columbia. By so doing it breached its contract of suretyship and precluded itself from getting relief in any court against its principal. Instead of permitting its principal to utilize its resources during the time between the final settlement and the date when the liability of the surety might accrue nearly six months after the filing of the suit as contemplated by its contract of suretyship and the statute, Section 270, Tit. 40, U. S. C., the casualty company jumped on its principal and bound it in veritable

chains and caused a breach of the performance bond and the resulting action in the New York court.

II.

**The circuit court of appeals undertook to try the case de novo and to disregard the findings and decree of the trial court on the issue of specific performance supported as they were by oral evidence, notwithstanding the Maryland Casualty Company had failed to appeal from the decree on that issue and therefore the rulings of the circuit court of appeals as to specific performance are in conflict with the rule generally observed in the federal appellate courts on this question.**

The trial court found as a fact that:

> "Nor * * * is the plaintiff entitled to a decree of specific performance of the agreement referred to in finding of fact No. 2. The plaintiff did not itself discharge all of its obligations under that agreement. Moreover the defendant never has received the final payment due from the United States and could not now comply with a decree concerning the disposition of that specific fund. Specific performance is impossible" (Rec. 124).

This finding is justified by the failure of the bill to allege performance by plaintiff and by the uncontradicted evidence.

The trial court also found as a conclusion of law, that:

> "Plaintiff is not entitled to a decree of specific performance of the agreement referred to in finding of fact No. 2" (Rec. 125).

And the trial court, by its decree, decided the issue with reference to specific performance against appellee as follows:

> "Now on this 22nd day of October, 1934, the court having heretofore fully heard and considered the evidence produced and having fully heard and considered the arguments of counsel, and being fully advised in the premises, finds that the plaintiff is not entitled to a specific performance of the contract under date of April 28, 1933, introduced in evidence" (Rec. 38).

Maryland Casualty Company failed to appeal from said finding and decree. Section 225, U. S. C. A., Title 28, gives the circuit court of appeals appellate jurisdiction only, and since there was no appeal by the Maryland Casualty Company, and no appeal or cross appeal by the Maryland Casualty Company, the circuit court of appeals was without jurisdiction, either original or appellate, to interfere with the finding of the trial court on that issue, and without jurisdiction to grant the relief of specific performance or to direct the trial court so to do. It is elementary that the federal appellate courts do not try equity cases on appeal *de novo* where the findings of fact are based upon conflicting evidence or upon evidence which supports them or tends to support them, or depends upon the credibility of witnesses, or where there is evidence in the record consistent with the finding of the trial judge, for in such cases the finding of the trial judge is unassailable on appeal. *Adamson* v. *Gilliland*, 242 U. S. 350, 61 L. Ed. 356, l. c. 357, 358.

The contention of the Maryland Casualty Company was that Exhibit "A" included not only estimate checks but also included all moneys received by the construction company from the government. The construction company has not yet received the money which would have constituted the proceeds of the final voucher which was not an estimate check. Hence, as the trial court found, specific performance was impossible. The finding was not alone that: "The plaintiff did not itself discharge all of its obligations under that agreement" (Rec. 124), but also, "Moreover the defendant never has received the final payment due it from the United States and could not now comply with a decree concerning the disposition of that specified fund. Specific performance is impossible" (Rec. 124). The decision of the court of appeals herein on the issue of specific performance is in conflict with the rule well stated by the Circuit Court of Appeals for the Fourth Circuit in *Fidelity Phenix Fire Insurance Company* v. *Benedict Coal Corp.*, 64 F. (2d) 347, wherein it is said:

> "This means, however, *not that we will hear it de novo,* as contended by defendants, but that we will hear it as we hear *any other equity appeal* under the rule that the findings of fact of the trial judge who saw and heard the witnesses will be given great weight and will not be disturbed unless clearly wrong."

The opinion of the court of appeals herein formulates a new and erroneous rule on the subject by holding (as admitted by respondent) that said court of appeals had jurisdiction to try the case *de novo.* Hence the departure by the Circuit Court of Appeals for the Eighth

Circuit from the law on the question should be corrected. *Forsyth* v. *Hammond,* 166 U. S. 506, *In re Woods,* 143 U. S. 202. This for the reason that the circuit court of appeals has departed "from the accepted and usual course of judicial proceedings," and hence comes within the character of rulings which are indicated as reasons which will be considered in this proceeding under Rule 38 of this court for reversal. The circuit court of appeals was limited and bound by certain well known rules which it wholly ignored. It transcended in the extent and character of its judgment or decree the law which was applicable to it. *Windsor* v. *McVey,* 93 U. S. 274. It accepted respondent's contention that it could, on appeal, try the case *de novo* following the dictum on that question in *Mound City* v. *Castleman,* 187 Fed. 921, cited in respondent's brief in opposition, but that was a case heard on a bill and answer without a reply, and hence could very well be tried *de novo* because the facts alleged in the answer were admitted. Hence the theory of the court of appeals was in conflict with the general rule. Furthermore, the court of appeals seemed to think that it had an unbridled discretion in an equity case on appeal. It overlooked the consideration that, as stated by this court in *U. S.* v. *Mayer,* 235 U. S. 55, by the chief justice: "—the jurisdiction of the circuit court of appeals is exclusively appellate."

That a case in a federal circuit court of appeals is not tried *de novo* is established by the following authorities declaring the federal rule:

*Nash* v. *Milford,* 33 App. D. C. 142, 144, 149, in a suit for specific performance, the court said of findings of fact in an equity case:

> "Such findings will not be set aside unless it appears that there has been an error of law or a conclusion of fact unwarranted by the evidence."

To the same effect is *Snow* v. *Snow,* 270 Fed. 364.

In *McLaren* v. *McLaren,* 45 App. D. C. 237, it is said:

> "It (the case) was tried in open court with full opportunity in the trial justice to observe the demeanor of the witnesses and judge of their veracity. In such cases the finding of the trial justice on questions of fact *has much the same sanctity as the verdict of a jury,* and will not be disturbed on appeal unless a mistake of judgment is so apparent as to demand a reversal."

In *Pollock* v. *Jamison,* 70 F. (2d) 759, the court said:

> "* * * the rule is well settled that where the judge has seen and heard the witnesses, his findings will not be disturbed unless it clearly appears that he has misapprehended the evidence or that he has gone against the clear weight of the evidence, or as it is sometimes said unless the evidence certified shows that the findings are clearly wrong" (citing many authorities).

The act of the court of appeals in reversing the decision of the trial court denying specific performance was an act which it was not authorized to do under the law applicable to the court and to the issues for the reason that respondent was defeated in the trial

court by the denial of the prayer for specific performance and as it did not appeal from the decision and decree of the trial court, then the court of appeals had no jurisdiction, right, power or authority to try the case *de novo* reverse the decree or to modify the decree so as to change it from a denial of specific performance and a direction to the trial court to grant specific performance. In *The Maria Martin* v. *Trans. Co.*, 12 Wall. 37, 20 Law Edition 251, the court said (leading case on the point):

> "Both parties in a civil action may sue out a writ of error, to a final judgment, but where one party only exercises the right the other cannot assign error in the appellate court; and the same right to remove the cause from the subordinate to the appellate court for reexamination is secured to both parties by the act of Congress allowing appeals, instead of writs of error, *in cases of equity* or of admiralty and maritime *jurisdiction*, or of prize or no prize, as provided in the 2nd section of the act allowing such appeals. 1 Stat. at L. 84; 2 Stat. at L. 244. Subject to the same rules and regulations as in case of writs of error, both parties may appeal, *in an equity*, admiralty or prize suit, from the final decree of the subordinate court, *but the appeal, when entered in the appellate court, is also subject to the same restrictions as are prescribed in case of writs of error.* Where each party appeals, each may assign error; but *where only one party appeals, the other is bound by the decree in the court below, and he cannot assign error in the appellate court, nor can he be heard if the proceedings in the appeal are correct, except in support of the decree from which the appeal of the other party is taken*" (italics ours).

This hornbook rule has never been departed from by this court, nor by any of the other courts of appeal of the other circuits and never was departed from by the court of appeals until this case came before it.

In support of this statement, we direct attention to the decision in *Peoria & Pekin U. R. Co.* v. *United States of America et al.*, 263 U. S. 528, 68 Law Edition 427, l. c. 431, where the court said:

> "* * * by failure to enter a cross appeal from the court's action in overruling its objection; the right to insist upon it here was lost. The appellees can be heard before this court only in support of the decree which was rendered. *The Maria Martin* (*Martin* v. *Northern Transp. Co.*), 12 Wall. 31, 40, 20 L. Ed. 251, 252; *Bolles* v. *Outing Co.*, 175 U. S. 262, 268, 44 L. Ed. 156, 158, 20 Sup. Ct. Rep. 94)."

In *Bolles* v. *Outing Co.*, 175 U. S. 262, 44 Law Edition 156, the court ruled:

> "It is sufficient to say of these that the defendant did not take out a writ of error, and cannot now be heard to complain of any adverse rulings in the court below (citing *Maria Martin*)."

In *O'Neil* v. *Mining Co.*, 174 Fed. 527, l. c. 535, the inimitable Judge Walter Sanborn said:

> "* * * as the defendants have taken no appeal they cannot be heard in the court to urge that this court should set aside the judgment in their favor. They can present contentions that will support the decree and those only. An appellee or a defendant in error who takes no appeal or writ of error himself cannot by assigning cross errors *or by brief or argument* confer jurisdiction on a federal appellate court to consider, review, or decide rulings against

him in the court below. Much less can he be heard to challenge rulings that were too favorable to him. Cross errors are not assignable in the national courts (citing acres of cases)."

2 Ruling Case Law 156, cites *O'Neil* v. *Wolcott Mining Co., supra*, as the original leading case in support of the following text:

"* * * a party who has not appealed cannot ask of an appellate court a judgment more favorable to himself than the one he obtained in the court below."

The court of appeals in this instance granted respondent a judgment more favorable to it than the one obtained in the court below, thus running counter to the law which created and limited its jurisdiction. The same rule was recognized in *U. S.* v. *American Express Co.*, 265 U. S. 125; *Cherokee Nation* v. *Black Feather*, 155 U. S. 528; *Bothwell* v. *U. S.*, 254 U. S. 231, 39 A. L. R. 56.

The Court of Appeals for the Fourth Circuit, in *Swger* v. *Smith*, 194 Fed. 762, l. c. 765, held:

"The appellees have not taken a cross appeal. Mere assertion of error in an appellee's brief does not give this court jurisdiction to review alleged error against an appellee."

We respectfully submit that the foregoing is in direct conflict with the decision herein.

In 2 R. C. L., page 182, it is said:

"* * * the appellee or defendant in error who has not appealed or sued out a writ of error cannot assign error, the right to assign errors being restricted to the appellant or plaintiff in error."

This same rule was curtly stated in *Clory* v. *Foundry Co.*, 132 U. S. 612.

See also the decisions of this court in *Blackhurst* v. *Johnson*, 72 F. (2d) 644; *Merchants S. Co.* v. *Johnson*, 69 F. (2d) 940; *Jones Store Co.* v. *Dean*, 56 F. (2d) 996; *O'Neil* v. *Wolcott Mining Co.*, 174 Fed. 527.

In *Alexander* v. *Cosden Pipe Line Co.*, 290 U. S. 484, 78 Law Edition 452, Mr. Justice Van Devanter said:

> "The discussion in the briefs make it advisable to point out at the outset that we have no occasion to reexamine the third and fourth claims. In the district court each of these claims was allowed in part and rejected in part. The defendant alone appealed. In the court of appeals the third claim was rejected and the award on the fourth reduced. The defendant alone petitioned for a review here. In this situation the plaintiff is not entitled to be heard in opposition to the parts of the decision of the court of appeals which were adverse to it—as were the rejection of the third claim and the reduction of the award on the fourth—but only in support of the parts which were in its favor. As to the former, it has acquiesced and become concluded by not seasonably petitioning for a review."

In the margin the leading authorities on the question here involved are cited, all of which demonstrate that the only question before the court of appeals for its determination was the ruling of the trial court with reference to the question as to whether or not the respondent was entitled to the relief of exoneration and since the court has properly found that it was not entitled to that relief, then it necessarily follows that the court of appeals should have reversed the judgment of the trial

court with directions to dismiss the bill of complaint with directions to direct the appellee to dismiss its suit pending in the Supreme Court of the District of Columbia so that the construction company could use enough of its funds to recover against the defaulting subcontractors and their surety companies.

## III.

Notwithstanding it appeared from the opinion of the court of appeals that Morley Construction Company, through its president, repeatedly demanded that Maryland Casualty Company comply with its contract to deposit in the joint account enough money to complete the plastering contract, and that its representative, in response thereto, said:

> "* * * that the Maryland Casualty Company was not going to put any more money into that account or that job" (Rec. 125),

thus and thereby refusing to carry out his contract, yet the court of appeals held that such conduct on the part of the construction company in itself showed acquiescence by the construction company in the refusal of its request by Maryland Casualty Company. The court of appeals cites the opinion from *Becker* v. *Becker,* 250 Ill. 117, 95 N. E. 70, as an authority supporting the singular decision of the court of appeals, but that case has no application whatsoever and is no authority for the extraordinary and arbitrary ruling on this question by the circuit court of appeals. In that case, the suit was not for specific performance of a contract. On the contrary

it was a partition suit by the heirs of a wife who was a party to an antenuptial agreement providing that her husband should keep his life insured for a specific sum in favor of his intended wife and that in case she died before he did that all her separate property should go to him and to his heirs. She died before he did and her heirs brought a partition suit naming the husband as a defendant. It appeared that the husband did not keep his life insured up to the time of his wife's death. The court, however, held that the heirs were estopped to claim that the contract was avoided by this failure on the following statement in the opinion:

> "The evidence in this case is uncontradicted that Mrs. Mishler made repeated declarations that she did not need life insurance; that she had money enough to live on and did not believe in life insurance; that the premiums paid therefor were a waste of money; that, after the insurance company in which her husband had his insurance became insolvent, she protested against his taking out other insurance for her benefit; *and that appellee acting on these repeated statements of his wife, did not take other insurance for her benefit.* * * * the uncontradicted evidence she did so insist and that her wishes in this regard were respected and carried out by the appellee. Her heirs should therefore, in equity, be estopped from taking any advantage of appellee's failure to continue the insurance for his wife's benefit."

That statement of the facts and the equity rule applied in that case demonstrates that the Illinois court recognized that if the wife had demanded repeatedly, as had the president of the construction company here, that the husband live up to his contract and procure the neces-

sary insurance, then the heirs would not have been estopped to raise the question and so said decision as applied to the facts stated in the opinion, as well as the facts herein, is in direct conflict with the opinion of the court.

*Langley* v. *Devlin,* 95 Wash. 171, 163 Pac. 395, is no authority whatsoever for the extraordinary ruling of the circuit court of appeals on this point. On the contrary, said opinion gives full effect to the clean hands doctrine and to the maxim that he who seeks equity must do equity and announces the law as this court announced it in *Keystone Co.* v. *Excavator Co.,* 290 U. S. 240. In fact, the court of appeals itself recognized that on the facts stated that is apparent to any person that it was rendering a *decision in conflict with the opinion* in this court in *Keystone Co.* v. *Excavator Co., supra,* for it put the following paragraph in the opinion:

> "We do not wish it to be thought that we are departing from the well-established rules regarding the granting of the remedy of specific performance. Such is not our intention" (Rec. 126).

We respectfully submit that it is a legal principle that no person can be heard to say that he did not intend to do that which his acts conclusively show that he did intend. This principle applies in every field of law and we respectfully submit that it ought to apply to the circuit court of appeals and it ought not to be heard to say that it did not intend to depart in this case from the well-established rules regarding the remedy of the granting of specific performance. For it is manifest on the

facts stated in the opinion and in the record with reference to this matter that the court of appeals could not have written and filed the opinion which it did if it did not intend to depart *in this case* from the well-established rules regarding the remedy of specific performance. The opinion states that it was not their intention to do so, but the physical facts show that they were misled or in error as to what their intention was. It is evident that the conception of the circuit court of appeals as to the meaning as to what constitutes acquiescence is contrary to the generally accepted notion on the question. We can readily understand how a strong man requested by a weaker person to do something on refusing to do so might think that because the person making the request did not shoot at him that he thereby acquiesced. The court of appeals has evidently applied this sort of analogy in determining the question as to whether or not the construction company acquiesced in the breach. We respectfully submit that this conclusion ought not to be approved by this court and that to permit this opinion to stand will unsettle rights and unsettle the law on this very important question unless corrected for it is in conflict with all the law on the question and should be corrected.

The opinion of the court of appeals is in conflict with the legal principle declared by this court and by other courts of appeal and by the courts generally that a person will be conclusively presumed to have intended

the natural consequences of his act and consequently the Circuit Court of Appeals for the Eighth Circuit has stated facts in the opinion which shows that the president of the Morley Construction Company repeatedly requested the Maryland Casualty Company to comply with its contract to deposit enough in the joint account to complete the plastering contract and that at the last interview the Maryland Casualty Company stated that it was not going to put any more money into that account or into that contract and that these facts made it impossible for the court of appeals under the rules with reference to specific performance to hold that the construction company had acquiesced in the breach of the contract.

The opinion of the court of appeals under the physical facts showing that the Maryland Casualty Company had deliberately refused to perform its contract to deposit enough in the joint account to complete the plastering contract and that it had deposited little more than one-third of the amount agreed by it to be deposited and that it arbitrarily did so after having been requested by the construction company so to do was an act which was wrong, both morally and legally, and that said act was in violation of the maxims that he who seeks equity must do equity and he who seeks equity must have clean hands and in conflict with the opinion of this court in *Keystone Co.* v. *Excavator Co.*, 290 U. S. 240, and the wealth of authority in 4 A. L. R. l. c. 73.

## IV.

**Respondent having violated the maxims that he who seeks equity must do equity and that he who seeks equity must come with clean hands in that it had, though requested so to do, deliberately and intentionally refused to carry out its contract to deposit enough money in the M. & T. Trust Company account to complete the plastering contract and the trial court having so found as a fact from the evidence before it and after having seen the witnesses and the parties and their counsel the act of the court of appeals in rendering its decree directing the trial court on remand to grant the relief of specific performance declared the law directly contrary to the way in which it has been declared by this and all the other courts.**

Not only did Maryland Casualty Company fail to deposit $11,989.29 of the $17,689.29 (Rec. 116) which it agreed to deposit but it *wilfully refused so to do* when demand was made that it comply with and perform its contract. Thus Mr. Kelly made the remark that the Maryland Casualty Company was not going to put any more money into that account on that job (Rec. 81).

In *Shubert* v. *Woodward*, 167 Fed. 47, l. c. 57, Judge Sanborn said:

> "It is an indispensable condition of a decree for the specific performance of a contract and of the issue of an injunction against its breach that the moving party has not been guilty of a substantial violation of it himself. *He who seeks equity must come into court with clean hands*" (italics ours).
>
> "Whenever there is anything in a lawsuit which with reference to which the plaintiff is unclean he must be denied relief by a court of conscience and of equity."

In *Keystone Co.* v. *Excavator Co.*, 290 U. S. 240, the court said (l. c. 241):

> "The question presented is whether the circuit court of appeals rightly applied the maxim, He who comes into equity must come with clean hands."
>
> * * * * * * *
>
> "Plaintiff contends that the maxim does not apply unless the wrongful conduct is directly connected with and material to the matter in litigation and that where more than one clause is joined in a bill and plaintiff is shown to have come with unclean hands in respect of only one of them, the others will not be dismissed.
>
> "Whenever a party who, as *actor,* seeks to set the judicial machinery in motion and obtain some remedy, has violated conscience, or good faith, or other equitable principle, in his prior conduct then the doors of the court will be shut against him *in limine;* the court will refuse to interfere in his behalf, to acknowledge his right, or to award him any remedy" (italics ours).

Courts of equity close their doors

> "* * * only for such violations of conscience as in some *measure affect the equitable relations between the parties in respect of something brought before the court for adjudication*" (italics ours).

Thereupon the court affirmed the judgment in 62 F. (2d) 48, where it was said:

> "Any really unconscientious conduct connected with the controversy to which he is a party, will repel him from the forum whose very foundation is good conscience."
>
> "It is enough * * * that the wrongful conduct was in regard to, and directly connected with, *one of the matters in litigation.*" * * * (italics ours).

"Under the above-stated principles we are of the opinion that the plaintiff should have been denied relief in a court of equity."

The petition alleged "by said contract plaintiff * * * agreed to place in said account * * * *sufficient money to complete the plastering contract*" (Rec. 4, Par. 6). It did not allege performance. The contract, fifth paragraph, provided "The Maryland Casualty Company further agrees to place on deposit in said account * * * sufficient money to complete the Giamberardino plastering contract" (Rec. 10-11). The evidence was that it did not perform (Rec. 81). The court found in Finding of Fact 2 that plaintiff agreed to deposit in said account "a further sufficient sum of money to complete the plastering" (Rec. 121). The court found (F. F. 3; Rec. 122) that plaintiff "did not deposit in the joint account a sufficient sum of money to complete the plastering contract." The court's opinion is, "Nor, in my view of the case, is the plaintiff entitled to a decree of specific performance of the agreement referred to in finding of fact No. 2. *The plaintiff did not itself discharge all of its obligations under that agreement*" (Rec. 124). "Conclusion of Law 1, the plaintiff is not entitled to a decree of specific performance of the agreement referred to in finding of fact No. 2" (Rec. 125). Plaintiff solemnly admitted in its reply "that the sole purpose of plaintiff's complaint is to require the defendant to deposit said money and to require its disbursement in accordance with said alleged contract." Notwithstanding the findings of fact and law the decree was directly in conflict therewith, for it ordered

"that defendant, Morley Construction Company, shall deposit the proceeds from said United States Treasury Warrant No. 2213155 in some bank and such deposit shall be designated as a special trust fund for the payment of bills for labor and materials used on the United States Veterans Hospital in Batavia, New York" (Rec. 36). The relief sought by the bill was with reference to said check or warrant (Rec. 5, 6, 7, 8, 9, 10).

The plaintiff as "actor" breached its contract. Its conduct was wilful and unconscionable (*Shubert* v. *Woodward*, 167 Fed. l. c. 57). That unconscionable conduct affected "the equitable relations between the parties in respect of something brought before the court for adjudication" within the rule stated in 290 U. S. 240. The "something" was the "warrant or check." It was with reference to that "something" that the decree gave specific relief, contrary to the rule. That wilful breach or wrongful conduct made plaintiff's "hands unclean" (167 Fed. 57). It was "wrongful conduct in regard to and directly connected with one of the matters in litigation." In fact, it was the one matter in litigation. That conduct should have repelled plaintiff "from the forum whose very foundation is good conscience" (290 U. S. 240).

V.

The alleged contract as embodied in Exhibit "A" was the particular instrument which the Maryland Casualty Company sought to have enforced. It omitted to disclose to the trial court in its pleading that said Exhibit "A" was not all of the contract or that if it were then that it was modified by Exhibit 3 (Rec. 77, 78), dated

April 29, 1933, but executed on the same day (Rec. 75) as Exhibit "A," by virtue of which whatever sum was deposited in said account became the joint property of the Maryland Casualty Company and the Morley Construction Company and respondent further failed to disclose to the court in its petition that the agreement mentioned in both those instruments was modified by the agreement of June 21, 1933, changing or substituting the name of H. F. Morley for that of the Morley Construction Company. The original account was that of the Morley Construction Company, alone, with counter signature (Rec. 98), and this was opened in accordance with the terms of Exhibit "A." This, according to the defendant's banker and witness, was changed on June 21, 1933, to a joint account in the name of H. F. Morley and Maryland Casualty Company. It thus appears that the Maryland Casualty Company was not frank with the chancellor, did not disclose all the facts, and the evidence disclosed that the contract which it sought to have enforced, to-wit: Exhibit "A," dated April 28, 1933, was changed and modified by Exhibit 3 (Rec. 77, 78), and that it was further modified on June 21st by substituting H. F. Morley for the Morley Construction Company and changing it to a joint account. These facts operate to deprive the trial court and the circuit court of appeals of jurisdiction to enforce the agreement specified in Exhibit "A."

## VI.

**The contract as a whole undertook to assign a joint interest to the Maryland Casualty Company of all claims which the construction company might thereafter have against the government arising out of the Batavia contract and was therefore void under the provisions of Section 203, Title 31, U. S. C. A.**

Section 203, *supra*, is the same as Section 3477, R. S. Mo., 1929, which was under judgment in the case of

*National Bank of Commerce* v. *Downie*, 218 U. S. 345. In that case this court held that where one party loans money to another and makes a contract or takes an assignment seeking to give it some interest in a claim against the government as security the contract or assignment is void, both at law and in equity.

> "Turning to Section 3477, we find Congress had in mind not only *all* transfers and assignments of *any* claim on the United States, or part of a claim or *any interest therein*, whether the transfer or assignment be absolute or unconditional, and *whatever was the consideration of the transfer or assignment*, but all powers of attorney, orders, or other authorities for receiving payment of any such claim, or *of any part or share thereof*. All such transfers, assignments, powers of attorney, orders, or authorities are declared to be 'absolutely null and void,' except there be a compliance with the conditions fully set out in the statute. None of those conditions were complied with in these cases.
>
> In *United States* v. *Gillis*, 95 U. S. 407, 24 L. Ed. 503, it appears that suit was brought in the court of claims, by the assignee of an unallowed claim on the United States, and the question arose whether the assignee could maintain a suit in his name for the proceeds of the claim. The court of claims sustained the assignee's right to sue, but this court, upon careful examination of the Act of 1853, reenacted in Section 3477 of the Revised Statutes, reversed the judgment, and directed the petition of the assignee to be dismissed. It was contended in that case that the Act of 1853 had reference only to claims asserted before the treasury department. But that view was rejected. After observing that the comprehensive provisions of the statute excluded any exceptions to the rule presented, the court said: 'We think, therefore, the Act of 1853 is of universal application, and covers *all claims* against the United States *in every*

*tribunal in which they may be asserted.* And such, we think, was the understanding of Congress when the Revised Statutes were enacted. In the revision, the Act of 1853 was included and reenacted.'

Among the earlier cases on the general subject is *Spofford* v. *Kirk*, 97 U. S. 484, 488-490, 24 L. Ed. 1032, 1034, 1035, frequently referred to in later decisions and always followed.

That was a case of a suit by Spofford, in the Supreme Court of this district. He became the holder, by assignment, of certain acceptances which, upon their face, provided for payment to be made out of any moneys received from the United States on the claim of one Kirk *against the government.* The assignee or holder of the acceptances paid value for them, and acted in entire good faith. The question was whether an assignment of a claim against the United States, made before the claim had been allowed, and before a warrant had been issued for its payment, had *any validity, either in law or in equity.* The court of original jurisdiction dismissed Spofford's bill, and the judgment was affirmed here. Mr. Justice Strong, speaking for this court, referred to Section 3477 of the Revised Statutes, and, among other things, said: 'It would seem to be impossible to use language more comprehensive than this. It embraces alike legal and equitable assignments. It includes powers of attorney, orders, or other authorities for receiving payment of any such claim, or any part or share thereof. It strikes at every derivative interest, in whatever form acquired, and *incapacitates every claimant upon the government from creating an interest in the claim in any other than himself.*' After referring to the fact that the court had not been called upon to decide in the Gillis case, whether the assignment there involved was invalid as between the assignor and the assignee, the opinion proceeds: 'But if, after the claim in this case was allowed, and a warrant for its payment was issued in the claimant's name, as it must have been,

he had gone to the treasury for his money, it is clear that *no assignment he might have made, or order he might have given, before the allowance, would have stood in the way of his receiving the whole sum allowed.* The United States must have treated as a nullity any rights to the claim asserted by others. It is hard to see how a transfer of a debt can be of no force as between the transferee and the debtor, and yet effective as between the creditor and his assignee to transmit an ownership of the debt, or create a lien upon it. Yet if that might be, and we do not propose now to affirm or deny it, the question remains, whether the act of Congress was not intended to render *all* claims against the government, *inalienable alike in law and in equity, for every purpose, and between all parties.* The intention of Congress must be discovered in the act itself. * * * We cannot say, when the statute declares all transfers and assignments of the whole of a claim, or any part or interest therein, and all orders, powers of attorney, or other authority for receiving payment of the claim, or any part thereof, shall be absolutely null and void, that they are not partially null and void, that they are valid and effective as between the parties thereto, and only invalid when set up against the government. It follows that, in our opinion, the accepted orders under which the appellant claims gave him no interest in the claim of the drawer against the United States, and no lien upon the fund arising out of the claim. His bill was therefore rightly dismissed.' "

In *Union Pacific Railway Co.* v. *McAlpine*, 129 U. S. 305, 32 L. Ed. 673, this court held that the remedy of specific performance presupposes the existence of a valid contract between the parties before the remedy can be given effect.

In *St. Louis National Stock Yards Co.* v. *Terry Co.*, 112 Ill. 384, it was said:

> "It were absurd to talk of specific performance of an agreement that has no existence."

Exhibit 3 declares that by virtue of the contract sought to be enforced the moneys due the construction company from the United States were "the property of the above-named parties" (Rec. 78), concerning which Exhibit 3 the record recites:

> "On the same day another agreement was executed on behalf of the Maryland by Kelly and on behalf of the Morley company by H. F. Morley" (Rec. 75).

The document refers to Exhibit "A," which seems to be the basis for Exhibit "3" (Rec. 77-78). It contains the following provision (Rec. 78):

> "Now, in consideration of such payment and mutual deposits and in the further consideration of One ($1.00) Dollar it is mutually agreed as follows:
>
> First. That all moneys deposited or to be deposited in said account shall be the *joint property* of the Morley Construction Company and the Maryland Casualty Company and the account shall be in all respects a joint account."

The second paragraph provided for delivery of the agreement to the bank and provided that it:

> "* * * shall constitute to them a notice of the fact that the aforementioned account is a joint one and *the property of the above-named parties*" (Rec. 78).

Exhibit 3 was, therefore, either a part of the contract, Exhibit "A," or an interpretation thereof by the parties thereto.

Hence the agreement was an illegal agreement in direct violation of the said statement under all the circumstances. This court in *St. Paul & Duluth Ry. Co.* v. *U. S.*, 112 U. S. 735, 28 L. Ed. 861, had to do with the effect of a mortgage sale of a claim for services rendered to the United States and the court said:

> "* * * in our opinion, the present case is not within the principle of these exceptions, but falls within the purview of the prohibition. It is a voluntary transfer, by way of mortgage, for the security of a debt, and finally completed and made absolute by a judicial sale.
>
> If the statute does not apply to such cases, it would be difficult to draw a line of exclusion which leaves any place for the operation of the prohibition.
>
> So, the transfer, by the same proceeding, of the contract itself, so as to entitle the assignee to perform the service and claim the compensation stipulated for, is forbidden by Section 3737, R. S."

The same principle has been declared in *Flint and Pere Marquette Railroad Co.* v. *United States*, 112 U. S. 762, 28 L. Ed. 862, a mortgage was executed by the railroad conveying to the mortgagee all choses in action and all claims and demands whatsoever, including claims against the United States. Said the court:

> "As it has just been decided in the case of the Saint Paul and Duluth Railroad Company that the assignment and transfer of such a claim was rendered void as against the United States by Section 3477, R. S., the appellant had no title to the claim

sued on which it could enforce in the court of claims."

And so it follows that the agreement was equivalent to a voluntary mortgage for the security of a debt, and when such voluntary mortgage is finally completed and made absolute by judicial sale, it comes within the prohibition of the statute.

## VII.

The opinion of the court of appeals, holding that the Maryland Casualty Company was not guilty of a substantial breach of its contract, is in direct contrast and conflict with the contract made by the parties themselves, for it was specifically stated therein and admitted in the bill of complaint by the Maryland Casualty Company that it had solemnly agreed to deposit enough money in the account to pay for the completion of the plastering contract (Rec. 3-4) and the opinion of the court of appeals finds that that statement is true, and the opinion of the court of appeals finds, as does the opinion of the district court, and the facts sustain the conclusion that the Maryland Casualty Company failed to carry out its contract, and hence, the court of appeals had no jurisdiction to hold that the failure of the Maryland Casualty Company to deposit in the joint account either $7,500.00 or $12,000.00 was not a substantial breach of that contract. The only amount deposited either to pay wages due or toward the completion of the plastering contract was $5,700.00, according to the figure found in the opinion of the court of appeals, the

amount which it was still obligated to pay was $7,800.00, and according to the figure testified to by Mr. Morley, the president of the construction company, and the witness for the casualty company, the total amount which the casualty company fell short of paying was about $12,000.00 (Rec. 80), so that the failure of the Maryland Casualty Company to deposit more than half of the amount it agreed to deposit cannot on the physical facts be held to be an unsubstantial failure to perform an unsubstantial part of the contract into which it entered and put in three written instruments. That failure caused the bank to decline to advance $10,000.00 additional (Rec. 90).

VIII.

**Respondent had no right to have the check or warrant impressed with a trust in its favor or in favor of persons supplying labor and materials since said check or warrant was received in the ordinary course of the contractor's business and constituted part of its resources in executing its contract with the United States. The statute prohibiting the assignment of claims against the government denies such asserted right to respondent.**

The rule stated in Section 203, U. S. C., Title 31, supplemented in *Kane et al.* v. *The First National Bank of El Paso, Texas*, 56 F. (2d) 534, applies here. In that case, the Maryland Casualty Company, the above-named plaintiff, intervened after the contractor went into bankruptcy. In that case the contractor deposited with a bank for collection checks received as partial payments on the contract. Before the checks were collected, the contractor advised the bank that it

could not continue business and the bank credited the entire balance of the bankrupt's checking account upon notes held by the bank against the bankrupt. The opinion says:

> "Maryland Casualty Company intervened as permitted by Texas practice, and sought a judgment against the bank for the $10,000.00 arising from the Alpine check."

In discussing the merits of the claim of the Maryland Casualty Company to recover, the court said:

> "We are not advised of any statute which requires that payments duly made to a contractor for public work be handled by him in any special way, or be given any particular application. No such contractual obligation appears in this case. In the absence of statute or stipulation otherwise the general responsibility of the contractor is credited in contracting with him, and his general resources are drawn on by him in executing the contract. Money or checks paid to him as the work progresses are the property of the contractor, unincumbered by any trust, just as are payments to others for goods manufactured or services performed. The contractor's banker may receive such checks and is not bound to see to their application, nor to ascertain the state of the contractor's account with each contract; nor, if he knows it, need he govern himself in anywise with references thereto. No wrong is done to the contractor's surety in recognizing the contractor's full title to such checks by taking them on deposit with all the consequences ordinarily attaching to such deposit. The cases supposed to establish a trust in favor of the surety are based on *Prairie State Nat. Bank* v. *United States*, 164 U. S. 227, 17 S. Ct. 142, 41 L. Ed. 412. That case did not involve a payment made to the contractor, but involved the reserve kept back by the United States

to secure final performance of the contract for which the surety on the bond had also bound himself. The surety having had to complete the contract claimed this reserve, which was still in the hands of the United States. The Prairie State Bank had only an invalid assignment of it. It was decided that this reserve was a security stipulated in the contract to be held by the creditor for the performance of the obligation, to which the surety became subrogated on performing the obligation just as he would be subrogated to any other security. The case has no application to money not reserved as a security but paid over to the contractor."

Hence, the Maryland Casualty Company, in the case at bar, was without right against the funds in question and without right to obtain any equitable relief.

IX.

**The Maryland Casualty Company was a compensated surety. It was its duty under the contract to act as surety for the Morley Construction Company and to give the Morley Construction Company an opportunity during the six months provided by Section 270, Title 40, U. S. C., to use the proceeds of the final voucher and its other resources to promptly make payment to laborers and materialmen, and its acts in preventing the construction company from using its money to discharge its obligations under the contract and bond, caused a breach of the performance bond, and consequently the Maryland Casualty Company breached its contract of suretyship and has forfeited all right to relief of any kind or character, either legal or equitable against its principal, the Morley Construction Company.**

The plaintiff herein was a surety for hire. It was paid by the construction company to lend its credit to it.

As pointed out in *Rollings* v. *Gunter,* 211 Ala. 671, 101 So. 446:

> "Suretyship is lending credit to aid a principal who has not sufficient credit of his own."

The plaintiff was paid by the construction company to do that which the construction company could not do. Could it have done so, it could have deposited obligations of the United States in lieu of the surety bond. See Title 6, Section 15, U. S. C. A. It was because the construction company did not have the obligations referred to in Section 15 of said Title 6 that it paid the surety company to lend its credit to it, but the surety company sold its credit to the construction company until the construction company had performed the contract with the United States, but it immediately withdrew it as soon as the final settlement was made and prevented the construction company from using its resources to promptly make payments to persons supplying it with labor and materials. In doing so, it breached its contract of suretyship to the great injury of the construction company.

The debt represented by the performance bond had not matured at the time the suit was filed and could not mature until nearly six months thereafter, to-wit, the 9th day of May, 1934. Since this is true, then no cause of action for exoneration had accrued to appellee at the time that it filed the suit in the court below and hence it was prematurely filed. We direct attention to the fact that the earliest judicial recognition of the doctrine of exoneration in favor of a surety against a principal was the case

of *Ranelaugh* v. *Hayes,* 1 Vern. (Eng.) 189, wherein Lord Keeper North, as shown in the official report:

> "* * * compared it (the case under consideration) to the case of a counterbond; where although the surety is not troubled or molested for the debt, yet at any time after the money has become payable *on the original bond,* this court will decree the principal to discharge the debt; it being unreasonable that a man should always have such a cloud hang over him."

We direct the court's attention to the fact that from the report in that case it appears that the principal was engaged in collecting customs and had collected them to the amount of 20,000 pounds and that he was liable to the King for the amount collected before ever there was a breach on the original bond, but the surety who was the Earl of Ranelaugh, having been charged by the King with having breached the original bond and the King having demanded payment from the surety by reason of the breach of the original bond, the surety, though he had made no payment, went into the court of chancery and the result was the declaration by the Lord Keeper above quoted. That is to say, in the original and leading case as to the right of a surety to a decree compelling exoneration it was held that the surety's right did not accrue until the principal *breached the original bond* on which *both* were liable. In all of the cases in which the courts have clearly and accurately laid down the doctrine, they have hewed to the line laid down in *Ranelaugh* v. *Hayes, supra.* The late Judge Sharswood, in *McClurg's Appeal,* 66 Pa. 375, l. c. 381, said:

"* * * as soon as the surety's obligation to pay becomes *absolute* he is entitled in equity to require the principal debtor to exonerate him and he may at once file a bill to compel an exoneration although the creditor has not demanded payment from him."

The statement by Judge Sharswood demonstrates that he contemplated that the *creditor* had the right to demand the payment from the *surety*. Otherwise, why use the foregoing language?

In *Beaver* v. *Beaver*, 23 Pa. 167, it is said:

"The case before us depends upon the equity of a *surety*. As between principal and surety, courts of equity always lend their aid for the protection of the latter. As soon as the surety's obligation has become *absolute*, he is entitled in equity to require the principal debtor to exonerate him, and he may file a bill to compel an exoneration, although the creditor has not demanded payment from him. * * * But the surety would not be entitled to exoneration before the debt became *payable*, because it is implied by the contract."

In *Southwestern Surety Ins. Co.* v. *Wells*, 217 Fed. 294, it is said:

"The doctrine is that *when the obligation* of a *surety* to pay has become *absolute* the principal may be required to pay in relief of the surety. The basis of this is obvious.

If the surety has paid his right legal and equitable, to be reimbursed, is clear. Equity abhors mere formalities and works of supererogation as nature abhors a vacuum. To require the surety to pay, in order that the principal might be required to pay is a circumlocution and superfluous. The direct road to the same objective is to require the

principal to pay. This is common sense, right, and equity.

* * * * * * *

*The limitations of the doctrine must not, however, be overlooked. The obligation of the surety to pay must have become absolute. To hold that because a surety may become involved he has an equity to be relieved would be to confer upon him the power to annul his own contract of suretyship''* (italics ours).

In *McElroy* v. *Hathaway,* 6 N. W. 876, Judge Cooley, holding that a surety was not entitled to exoneration before the surety became liable said:

"It is not pretended that this relation is sufficient, in general, to challenge the jurisdiction of equity for the surety's protection. He is supposed deliberately to assume his responsibilities and if the principal fails to meet his obligations with due diligence until the surety deems it necessary to seek a remedy for his protection, *he must first perform the obligation he has entered into for his principal, and then sue for indemnity.* This is what he must do when he is surety on negotiable paper, or on a money bond or any similar undertaking. It will not be claimed that the surety in any such case, *when he becomes alarmed at the failure of his principal to pay or perform promptly, can come into equity and compel the principal to turn over his property to a receiver,* to be applied to the satisfaction of his undertaking."

In *American Bonding & T. Co.* v. *Logansport & W. Valley Gas Co.,* (C. C.) 95 Fed. 49, it was held that a surety could not maintain a bill in equity in the nature of a bill *quia timet* to procure a decree to indemnify him against apprehended danger or loss by reason of an undertaking to procure a restraining order executed as surety for the defendant at the latter's request, where

the suit in connection with which the undertaking was given was still pending, and it was uncertain as to whether any liability would ever accrue. The court said:

> "The bill does not show that the complainant has paid anything on account of its having executed said undertaking as surety, nor that any liability has been finally adjudged by the Supreme Court of the United States against the principal in said undertaking. Whenever a surety signs an obligation with a principal, the law raises an implied agreement to indemnify the surety against all loss and damage by reason of his suretyship. The covenant relied upon in this case, which is 'to indemnify and keep indemnified' the complainant 'from and against any loss,' etc., is no broader in its legal effect than the obligation implied by law in the absence of such special covenant. Nothing is added to the force of the covenant by the words 'and keep indemnified,' because one cannot be 'indemnified' unless he is 'kept indemnified.' As soon as the contract of suretyship was entered into, it is firmly settled that the law raised an implied promise on the part of the principal to indemnify the surety against any loss to which he may be subjected by reason of the contract, and it is equally well settled that the surety cannot recover from the principal until a loss has been actually incurred by the surety. The City of Peru has no present right of action against the principal in the undertaking, and the surety has not been compelled to pay any sum, and, for aught that appears in the complaint, it may never be called upon to pay anything, or be put to any loss whatever, on account of its suretyship. *The complainant has simply incurred, and is still incurring, a risk as surety which it contracted with the defendant to incur, and for which it charged and has received a premium.* A bill in equity certainly cannot be maintained on the covenant set up until the City of Peru has obtained a decree by virtue of which it has a present right to recover of the principal *and surety* the moneys stipulated to be

paid by the terms of the undertaking. When the liability of the principal to make such payment has been finally established by the judgment of the Supreme Court, it will be time enough to pay, or to give indemnity to pay. As was observed by Sir G. M. Giffard, V. C., in *Wooldridge* v. *Norris*, (1868) L. R. 6 Eq. 410: 'Now, as regards the right of a plaintiff to file a bill *quia timet*, the principle is clearly laid down by Lord Redesdale in these terms: "A court of equity will also prevent injury in some cases by interposing before any actual injury has been suffered, by a bill which has been sometimes called a bill *'quia timet,'* in analogy to proceedings at the common law, where in some cases a writ may be maintained before any molestation, distress, or impleading. Thus, a surety may file a bill to compel the debtor on a bond in which he has joined to pay the debt *when due*, whether the surety has been actually sued for it or not, and, upon a covenant to save harmless, a bill may be filed to relieve the covenantee under similar circumstances." "At present it is not certain whether any such liability will ever accrue, and certainly the mere apprehension on the part of the surety that it may incur such liability gives it no right to maintain a suit upon a mere covenant to indemnify against loss." ' "

The principal and surety herein occupied that relation by virtue of the execution of a statutory performance bond on which bond neither could be liable to creditors until after May 9, 1934, nearly six months after the filing of the suit (November 27, 1933) and as there was no liability on the bond at the time of the institution of the suit, no cause of action has accrued to plaintiff.

The Act of Congress is incorporated in the performance bond by express reference (Tr. 62). It recites that:

> "If the principal * * * if said contract is for the construction * * * of a public building or a public work within the meaning of the Act of August 13, 1894, as amended by Act of February 25, 1905, shall promptly make payment to all persons supplying the principal with labor and materials in the prosecution of the work provided for in said contract * * * then, this obligation to be void; otherwise to remain in full force and virtue."

The condition of the bond is:

> "Now, therefore, if the principal * * * *shall promptly* make payment to all persons supplying the principal with labor and materials in the prosecution of the work provided for in said contract * * * then, this obligation to be void; otherwise to remain in full force and virtue."

It will be noted that the bond does not fix a day certain for payment. The language is "promptly make payment." The question then is, what does the word "promptly" mean under the circumstances herein?

In 50 C. J. 719, the text is:

> "Its meaning, it has been held is relative; it does not have any exact definition with respect to a period of time (*Irvin* v. *Koehler,* 230 Fed. 795), but depends largely on the circumstances of each case (*Irvin* v. *Koehler, supra*)."

In *State* v. *Southern Cotton Oil Co.,* 164 La. 225, it was held that claims made within three years are made "promptly." From the terms of the bond alone, either by the application of the liberal or strict rule of construction, it would be impossible to determine when there was a breach so as to render the surety liable. There could be no breach unless the principal failed to

"promptly make payment." In view of the fact that the meaning of the word "promptly" is "relative" and that it does "not have any exact definition with respect to a period of time," it is necessary to examine the statute embedded in the bond to determine that question. The record discloses that no suit was brought by the government within six months from November 9, 1933. This fact is also established by *U. S. for the Use of Johnson* v. *Morley Construction Company and Maryland Casualty Company,* 11 F. Supp. 841. Nor was there any claim in the plaintiff's petition that the construction company had not carried out its contract with the government in so far as building the building was concerned. On the contrary, it was alleged that the construction company completed the building so that with reference to the instrument in the bond securing performance to the United States, as outlined in *Equitable Surety Company* v. *United States,* 234 U. S. 448, there was no breach. That is, there was no breach with reference to the part of the bond securing performance of the contract to the United States. The question is, was there such breach with reference to the separate provision requiring the construction company to "promptly make payment" to persons supplying labor and materials? The statute itself affirmatively answers the question and points out that there was no breach and could be no breach until six months after the date of the final settlement and nearly six months after the filing of the suit. That is, the breach date could not arrive until May 9, 1934. Says the statute:

"If no suit should be brought by the United States *within six months* from the completion and final settlement of said contract, *then* the person or persons supplying the contractor with labor and materials shall, upon application therefor, and furnishing affidavit * * * that labor or materials * * * has been supplied by him or them, and payment *for which has not been made* be furnished with a certified copy of said contract and bond, *upon which he or they shall have a right of action*, and shall be and are hereby, authorized to bring suit in the name of the United States in the District Court of the United States in the district in which said contract was to be performed and executed * * * and not elsewhere for his or their use and benefit, against said contractor and his sureties, and to prosecute same to final judgment and execution."

The foregoing statutory provisions bind the principal and surety as much as if set out in the bond in terms (*People* v. *Metropolitan Surety Co.*, 211 N. Y. 107, 105 N. E. 99).

The statute establishes that if the principal had paid at any time before May 9, 1934, he would have *promptly* made payments within the meaning of the statute and hence within the meaning of the bond. Until then there was and could be no breach of the bond by either principal or surety. Until then, there was no liability that could be enforced against principal or surety *on the bond*. Of course, the principal had an obligation to make payment for labor and materials supplied "*apart* from any bond, the debtor creditor relation existing *independently*" (*American Surety Co.* v. *Westinghouse E. Mfg. Co.*, 80 L. Ed. 31). "The obligation of the surety, however, *unlike that of the* contractor, was created *solely by the bond*" (*ibid*). Therefore, until the principal failed to

"promptly make payment," that is, until May 9, 1934, the *surety* was not *liable* to any obligee or any creditor. Nor was the principal liable *on the bond* for it was the bond that made his obligation so far as the principal suretyship relationship is concerned "definite and certain" (*ibid*). That is, it fixed the time when the principal's obligation must be performed, thus making it "definite and certain" (*ibid*).

That is, the statute fixed the time when the principal's obligation must be performed, thus making it definite and certain (*ibid*). It follows that as to the principal and suretyship relation, the payment was not a past due payment when the suit was filed. The payment could be made at any time up to May 9, 1934, and could not be *past* due until after that date and it is well settled that a surety cannot have the relief of exoneration or a decree compelling payment by the principal before the surety has made payment unless the debt is *past due*.

In 50 C. J. 270, it is said:

> "In an action to enforce payment by the principal or other exoneration the bill should allege that the debt is *past due* and that the *surety* is liable upon it (citing *Rapp* v. *Relief Co.*, 10 Oh. Cr. N. S. 515, 30 Oh. Cr. Ct. 433)."

It was there held that a petition alleging that a note on which plaintiff was endorser becomes due on the day of filing the petition does not allege *past due indebtedness*, authorizing sureties to enforce payment by the principal, nor state a ground for appointment of receiver.

In *Scales* v. *Cox*, 106 Ind. 261, it is said that:

"The claim against the principal must have matured prior to request."

In *Strong* v. *Fence Co.*, 245 N. Y. 48, Justice Cardozo said:

"Congress has said that contractors shall be liable to materialmen and laborers in an amount to be made determinate by the giving of the bond. The statutory *liability*, which is inseparably linked to the *statutory remedy, assumes* the existence of a bond as an indispensable condition. Till then there is neither federal jurisdiction nor any right of action that can rest upon the statute."

From the foregoing, it appears that the liability and the remedy are inseparable, and hence neither the remedy, nor the liability, nor the right of the creditor against the surety, are existent until the lapse of six months from the date of final settlement. Consequently, there was no liability existing which the plaintiff had any right to enforce when it filed its suit on November 27th, 1933. In Bispham on Equity, we find the following, Section 331, p. 537, 10th Ed.:

"In the ordinary case of principal and surety, as soon as the creditor has acquired the right to *immediate payment from the surety*, the latter is entitled to call upon the principal debtor to pay the amount of the debt guaranteed, so as to relieve the surety from his obligation. (*Wooldridge* v. *Norris*, L. R. 6 Eq. 410; *Nisbet* v. *Smith*, 2 Bro. Ch. 582. See, also, *Pride* v. *Boyce*, Rice's Eq. 276, 287; *Bishop* v. *Day*, 13 Vt. 81, 88; *Hoffman* v. *Johnson*, 1 Bland Ch. 103, 105; *Stevenson* v. *Tarerness*, 9 Gratt. 398; *Rice* v. *Downing*, 12 B. Mon. 44; *Ellis* v. *Southwestern Land*

*Co.*, 108 Wis. 313; note to *Dering* v. *Earl of Winchelsea*, 1 Lead. Cas. Eq. 135 (4th Am. Ed.); *Cotting* v. *Elevator Co.*, 214 Mass. 294; *West Huntsville Co.* v. *Alter*, 164 Ala. 305; *Fidelity Co.* v. *Buckley*, 75 N. H. 506; *Carr* v. *Davis*, 64 W. Va. 528."

In *Cotting* v. *Elevator Co.*, 214 Mass. 294, it is said:

"* * * the *plaintiff* who seeks such relief (that of exoneration) must be under an *existing* and *admitted liability* to the burden or charge from which he seeks to be relieved, or at least the facts must be such as necessarily to *create* such a liability. *Antrobus* v. *Davidson*, 3 Mer. 569, 580; *Hughes-Hallett* v. *Indian Mammoth Gold Mines*, 22 Ch. D. 561; *Ascherson* v. *Tredegar Dry Dock and Wharf Co.*, (1909) 2 Ch. 401, 409."

"In the case at bar plaintiffs do not concede that they are under the liability from which they seek to be exonerated. * * * The bill cannot be maintained on such averments."

* * * * * * *

"The demurrer must be sustained in any event."

In *Hughes-Hallett* v. *Indian Mammoth Gold Mines Co.*, 22 Ch. D. 561, l. c. 564, it is said:

"* * * this is a simple case of a person who has taken property in his own name on behalf of another, and who is entitled to an indemnity from that other person against liability in respect of that property, suing for an indemnity before the contingency which creates the damage has arisen. It is, in my judgment, a mere action *quia timet*, and it is a very important inquiry whether such action can be maintained. If it can it is obvious that every person who has undertaken a position of responsibility for another which entitles him to any indemnity may sue before the right to indemnity accrues—before the damage has accrued which gives rise to

the right of indemnity. It appears to me that there is no authority for such an action."

In *Ascherson* v. *Tredegar Dry Dock and Wharf Co.*, (1909) 2 Ch. 401, 409, it is said:

"The present action is not like *Dale & Perry* v. *Lolley* (2 Pro. C. C. 582n), where a surety brought an action to compel the debtor to pay a bill not due for twenty months, or *Hughes-Hallett* v. *Indian Mammoth Gold Mines* (22 Ch. D. 861), where he asked for indemnity against future contingent liability."

The Court of Appeals for the Third Circuit in *Stitzer* v. *U. S.*, 182 Fed. 513, held that the liability *on the bond* was not mature in the sense that liability on a promissory note is not mature until the note itself matures, and held that the form of action in that case on the bond was assumpsit and the defense of nonassumpsit permitted the showing that six months had not elapsed from the date of the final settlement. In other words, permitted a showing that there was *no liability.* The Supreme Court in *Texas Pacific Co.* v. *McCord,* 233 U. S. l. c. 163, referred to the *Stitzer* v. *U. S.* case as "a well-considered opinion," and hence we reproduce it.

"The question involved herein is whether a person who has supplied labor and materials to a contractor with the United States has the right to bring an independent action on the bond given under the Act of Congress above referred to, before the expiration of six months from the completion and final settlement of the contract."

* * * * * * *

"To call the statute in question a limitation is not only a misnomer, but an absolute misconception

of the purpose of the act, *which was to give any person or persons supplying* labor and materials to a contractor with the government, *a right of action where before none existed.* The act was not intended to, and does not bar, any cause of action, *but rather creates one.*"

* * * * * * *

"The further claim is made, however, that, by not pleading the statute and by going to trial on the merits, the objection that the suit was prematurely brought was waived. Of course, if the defendants were not required to plead the statute, as we conclude they were not, no waiver would arise out of the fact that it was not pleaded. But, aside from that, we think it was not a case where a waiver could be inferred. The act does not intend that persons may collusively maintain an action thereunder within the six months period exclusively reserved for that purpose to the United States. Such conduct would be in derogation not only of the rights of the United States, but of the act itself. It cannot be that creditors either by collusion or waiver can thwart the purpose of the act. The case might be different if there were no other interested party. Moreover, *it should be borne in mind that during that period the plaintiff had no cause of action,* and there was consequently nothing upon which the defendant's waiver, if any, could act; the defendants could waive a right of their own, but could not, contrary to the express terms of the statute, by waiver *confer a right of action on plaintiff.*"

* * * * * * *

"*No party* prior to the expiration of six months from the completion and final settlement of a contract, *except the United States,* was thereby authorized to sue upon the bond. * * * during that period, *and all of it,* the *only right of action on a bond* given under that statute *is vested exclusively in the United States.*"

* * * * * * *

"The form of action below was assumpsit, and among the pleas pleaded thereto was that of non-assumpsit, and the case was tried upon that plea only. Under such a plea an objection to the suit if prematurely brought is always available. *If a suit were instituted on a promissory note prior to its maturity,* and the defense of nonassumpsit were interposed, there can be no question that thereunder the *immaturity of the note at the time the suit was instituted could be shown.*"

The court in *Texas Cement Co.* v. *McCord,* 233 U. S. l. c. 162, cites *United States* v. *Boomer,* 183 Fed. 726, in support of its statement that:

"The statute thus creates a new liability and gives a special remedy for it and on well-settled principles the limitations upon such liability become a part of the right conferred and compliance with them is made essential to the assertion and benefit of the liability itself."

The Boomer case was from the Eighth Circuit, Judges Vandeventer, Hook and Carland sitting. Said the court:

"The statute created a *new legal liability* * * * The time within which the suit must be brought operates as a *limitation of the liability itself* * * * It is a condition attached to the right to sue at all. Time has been made of the essence of the right and *the right is lost if the time is disregarded.* The *liability and the remedy are created by the same statute,* and the *limitation of the remedy* is, therefore, to be treated as *a limitation of the right.*"

In other words, the liability *on the bond* is non-existent *before* and after the six months' period. There is no cause of action *after* the six months' period.

If a cause of action did not exist May 9, 1934, how could plaintiff base its alleged right to exoneration on a liability which was unborn when the bill was filed?

In *Bell* v. *Ry.*, 58 F. (2d) 569 (C. C. A. 8), the court, citing the Boomer case in passing on a federal statute creating a right and fixing the time for its enforcement, said:

> "Under such a statute the lapse of time not only bars the remedy, *but destroys the liability.*"

By the same token the "lapse of time for six months after the final settlement not only brought the remedy into existence but *created* the liability."

The trial court made the mistake of holding as a matter of law that the *liability on the bond* under the Heard Law existed as soon as the materials were furnished or the labor given to the principal. The authorities are the other way. The Supreme Court in *U. S. ex rel. Tex. P. Cement Co.* v. *McCord,* 233 U. S. 163, discussing Section 270, Title 40, said:

> "By this statute a right of action upon the bond is created in favor of certain creditors of the contractor. The cause of action did not exist before, and is the creature of the statute. The act does not place a limitation upon a cause of action theretofore existing, but creates a new one upon the terms named in the statute. The right of action given to creditors is specifically conditioned upon the fact that no suit shall be brought by the United States within the six months named, for it is only in that event that the creditors shall have a right of action and may bring a suit in the manner provided. The statute thus creates a

new liability and gives a special remedy for it, and upon well-settled principles *the limitations upon such liability become a part of the right conferred, and compliance with them is made essential to the assertion and benefit of the liability itself.*"

In that case an action was brought before the lapse of six months and the court held that the liability did not begin until the six months elapsed, saying:

"We think, therefore, that the action was prematurely brought, in view of the facts stated in the certificate. This view of the statute was also taken in a well-considered opinion in the Circuit Court of Appeals for the Third Circuit. *Stitzer* v. *United States,* 105 C. C. A. 51, 182 Fed. 513."

X.

**The decree of the court declining to direct the plaintiff to dismiss its cross bill and release the money due from the United States to the construction company and by its decree directing that all of said money be paid to laborers and materialmen rendered a decree in favor of the surety and prejudicial to the creditors and hence was erroneous.**

The total assets of the construction company with reference to the Batavia contract amounted to $106,369.84 (Tr. 68-70). However, the item of $41,661.23 consisted of claims against the New Amsterdam Casualty Company and the National Surety Company or National Surety Corporation, which said surety companies declined to pay and hence it was necessary for the construction company to compel payment. There was also a claim against the Standard Accident Company for $521.00. Because of

the action of the plaintiff and of the decree of the court, the construction company was prevented from using its assets to collect the obligations due it and to pay these bills. The court found, Finding of Fact 7, that it was the intention of the officers of the construction company to use the proceeds of the warrant to pay the bills of the construction company.

As Mr. Bernard D. Morley testified:

> "It was our intention in the event we were able to recover against the defaulting contractors or their sureties, to eventually pay these notes so that the creditors would be paid in full as that is the only way that we can keep on doing business, to pay those bills" (Tr. 105).

The court found that this testimony was true. Furthermore, it appears that the Morleys were engaged at the time of the trial, or at least at the time the bill was filed, in other construction enterprises. The court's decree, therefore, operated to the prejudice of the creditors, not alone in that it left the amount specified in the warrant tied up, but it also prevented the construction company from realizing against the defaulting subcontractors and the sureties. The law on this question has been well stated in *Greiberg* v. *Leff*, 146 Atl. 196-197, 104 N. J. Eq. 502; thus:

> "When protection can be afforded a surety without substantial injury to the creditor a court of equity may award that relief without the debt being first paid by the surety."

* * * * * * *

"* * * relief of this nature should only be awarded with due regard to the interests of the creditor, the creditor should not be subjected to the danger of loss, or even unreasonable delay in collecting his debt; indemnity against loss may be required; the special circumstances of the case may control the relief."

Not only is the surety's claim for subrogation subordinate to the rights of laborers and materialmen under this law, but necessarily its equitable claim for exoneration is also subordinate.

This principle has been well put by the circuit court of appeals in *American Surety Co.* v. *Westinghouse Mfg. Co.*, 75 F. (2d) 377 (the court said as to the rights of creditors):

"* * * the appellants' (sureties) claim is subordinate to those of the appellees for the additional reason that the surety is not prior to the creditors being fully paid and satisfied, subrogated to rights and remedies which would operate to the prejudice or injury of creditors."

In *American Surety Co.* v. *Westinghouse Mfg. Co.*, 80 L. Ed. 31, the court said:

"Acquittance under the bond did not leave the surety at liberty to prove against the assets of the insolvent principal on equal terms with the materialmen, still less to go ahead of them. The settled principles of the law of suretyship forbid that competition." * * * A surety who has undertaken to pay the creditors of the principal, though not beyond a stated limit, may not share in the assets of the

principal by reason of such payment until the debts thus partially protected have been satisfied in full. This is the rule where the right to a dividend has its basis in the principle of equitable subrogation."

* * * * * * *

"Slight differences in the facts may cause the equities to vary, and thus vary the result. What concerns us here is the remedy available where the bond has been given under the mandate of a statute. Equity then forbids that the statutory security be whittled down indirectly by any promise of indemnity, general or specific. Debtor and surety may not effectually agree that materialmen and laborers shall have less of the general assets as the price of their right to recover on the bond. Through the bond and the statute a new relation has been established with a new set of equities, not subject to destruction at the pleasure of the principal. The integrity of that relation is in the keeping of the law."

The equities of the creditors with reference to the equitable relief of subrogation has been decided to be superior to that of the surety under this peculiar law and by the same token when the equitable relief is exoneration which is merely a variety of anticipatory subrogation, then the same equitable principles which favor the creditor when the claim is based upon a right to be subrogated to the assets of the principal must necessarily apply. Especially must this be so when the surety seeks exoneration *prematurely* from the assets of the principal to the detriment not alone of the principal, *but of the creditors*.

XI.

**The right to exoneration is merely the right which the surety always had to bring a suit against the principal AND THE CREDITOR to compel the creditor to enforce payment against the principal and as the right of creditors to enforce the liability on the bond against the principal and surety had not accrued at the time the bill was filed, there could be no exoneration as all the necessary parties were not in court.**

In *King* v. *Baldwin & Tawler*, 2 Johns., Ch., 554, Chancellor Kent pointed out that the right to exoneration was a rule which authorized the surety not merely to *notify the creditor* to sue to the principal debtor nor was it a right to sue the debtor and get a blanket decree to make him pay all his debts as here, but it was a rule which authorized the surety to sue the *creditor* and the principal debtor and *compel* the creditor to compel payment or let the surety be discharged. Thus, l. c. 561 (2 Johns., Chan.):

> "The surety has a right on the day the debt is due to come in chancery and insist on its being put in suit * * *"

l. c. 563:

> "When the surety has ample and well-settled means of relief, through the medium of a court of equity, which will at once *compel* the creditor to do his duty, it is not necessary, and, as I humbly apprehend, not expedient, to introduce a new principle of action between creditor and surety."

l. c. 560:

> "The surety is entitled to pay the debt when it becomes due, *or he may call upon the creditor by the*

*aid of this court, to enforce his demand against the principal debtor.*"

In *Warner* v. *Beardsley*, 8 Wend. 195, Ch. Walworth said:

"If the time of payment is past and the *creditor neglects to proceed*, the surety himself may institute a suit in equity against the principal debtor *and the creditor;* but such suit is not for the purpose of delaying the latter; it is to compel the former to pay the debt, and thus relieve the surety from his responsibility."

In *Gibbs* v. *Mennard*, 6 Paige 258, Chancellor Walworth said, l. c. 260:

"In an ordinary case of suretyship for the payment of a debt, the surety, *after the debt has become due*, may institute a suit in equity against the principal debtor *and the creditor*, for the purpose of compelling the former to pay the debt *and the latter to receive it*, and thus relieve the surety from further responsibility (*Warner* v. *Beardsley*, 8 Wend. Rep. 199; *King* v. *Baldwin*, 2 Johns., Ch. R., 561; 17 John. Rep. 384, *S. C.*)."

In *Alexander* v. *Hamilton*, 287 Fed. 508, this court said:

"The plaintiff urges that he has a right to maintain this action to specifically compel the payments of the notes and mortgages, *because he occupies the position of a surety.* * * * even if this could be held to be such an action, the relief prayed *could not be granted without making the creditor, to whom the money is admittedly owing, a party, so that the exact amount could be determined.* In the foreclosure suit in Montana, to foreclose the mortgage the amount due thereunder can be properly determined."

"The general rule in equity is that all persons materially interested, either legally or beneficially, in the subject matter of a suit are to be made parties,

and when it appears that necessary and indispensable parties are beyond the reach of the jurisdiction of the court, it would be useless for the court to grant leave to amend."

• • • • • • •

"Further, the complaint itself specifically alleges that the notes and mortgages are in the hands of parties outside the jurisdiction of the lower court, and there is no allegation of payment or damages actually suffered by the plaintiff, or any claim of title or interest in the land in question" (italics ours).

In 21 R. C. L. 1110, Sec. 146, it is said that a bill of this nature may be filed

"provided no rights of the creditor are prejudiced thereby."

• • • • • • •

l. c. 1111:

"Where a surety comes into a court of equity to compel the principal to pay the debt he stands in the position of an equitable assignee, *and may use the remedies of the creditor at his own risk and costs*" (italics ours).

But the creditors had no remedy against the surety when it filed its bill.

In *Moore* v. *Topliff*, 107 Ill. 241, it is said:

"A surety, after the debt has become due, may, without making payment himself, come into a court of equity and compel the principal to pay the debt (*Hale* v. *Wetmore*, 4 Ohio St. 600; *Tankersley* v. *Anderson*, 4 Dessan Eq. 44; *City of Keokuk* v. *Love*, 31 Ia. 199). In 2 American Leading Cases, the rule is stated thus:

" 'The surety stands in the position of an equitable assignee and may use the remedies of the creditor at

his own risk and cost. He may accordingly file a bill against the principal to compel him to pay the debt at maturity, and *make the creditor a party,* because his interests are at stake, and in order that he may be at hand to receive the money.' ''

In *Neal et al.* v. *Buffington,* 42 W. Va. 327, 26 S. C. 172, l. c. 173, it is said:

''* * * when this suit was brought, the appellant has not paid the debt, and probably has not paid it yet. But he is entitled, nevertheless, the debt being due, to come into equity by bill *quia timet against the creditor* and *debtor,* and compel the latter to make payment, so as to exonerate himself from responsibility. Story, Eq. Jur., 327, 639, 849. He may enforce, for his exoneration, any liens of the creditor on the estate of the principal. He *could not sue the debtor alone,* claiming the right of payment in order that he might discharge the debt; but where is the reason, when he has paid part, against his *bringing the creditor* and principal debtor in, and enforcing the lien for the *payment of the balance to the creditor first.*''

In *Paravine & Wzye* v. *Title Guaranty & Surety Co.,* 36 App. Cas. (D. C.) 348, was a case in which the *creditor* was made a party.

In note to Section 1417, Pomeroy's Equity Jurisprudence, 4th Edition, it said:

''After the obligation becomes payable, the surety, before he has paid it, and whether he has been sued by the creditor or not, may maintain a suit in equity against the debtor—in the nature of a bill *quia timet*—to compel *him* to pay the debt or perform the obligation; provided the creditor can himself enforce payment or performance, and neglects or refuses to do so. The creditor is, of

course, made a codefendant (citing a great number of cases, among others, *Dering* v. *Earl of Winchelsea,* 1 Cox 318, 1 Lead. Cas. Eq., 4th Am. Ed., 120. Also notes in 2 Lead. Cas. Eq., 4th Ann. Ed., 278, 280, 283, 306, 1896, and a great number of other cases)."

In 57 C. J. 1141, it is said:

"Creditors to whom claims are payable, under a contract of indemnity, are not only proper, but *necessary,* parties to a suit for specific performance of such contract."

In 50 C. J. 245, it is said:

"The creditor entitled to the debt for which the surety is liable should be made a party in order to receive payment from the principal."

The foregoing rule is recognized in *Alexander* v. *Hamilton,* 287 Fed. 508.

In *Coleman* v. *Taggart,* 4 Pet. 190, 7 L. Ed. 828, it is said:

"* * * however numerous the persons interested in the subject of a suit they must all be made parties, plaintiffs or defendants in order that a complete decree may be made; it being the constant aim of a court of equity to do complete justice by embracing the whole subject, deciding upon and settling the rights of all persons interested in the subject of a suit; to make the performance of the order perfectly safe to those who have to obey it and to prevent future litigation."

In 50 C. J. 269, it is said:

"In accordance with the well-recognized general rule when the surety proceeds in equity all interested parties who are not complainants should be made

defendants and where the debt is unpaid and the surety seeks exoneration or indemnity by such suit the *creditor must be a party*, for the ultimate relief is not to have the amount paid to the surety, but to the creditor."

*Hurm* v. *Collignon*, 202 Ky. 807, 261 S. W. 602.
*Murphy* v. *Jackson*, 58 N. C. 11.
*Still* v. *Holland*, 1 Oh. Dec. (Reprint) 584.
*O'Neal* v. *Smith*, 10 Lea. 340.
*Gilliam* v. *Esselman*, 5 Sneed 86.
*Stephenson* v. *Taverners*, 9 Gratt. (50 Va.) 398.
*Call* v. *Scott*, 4 Call (8 Va.) 402.

XII.

**As there was no liability on the bond which could be enforced in any court but that of the Western District of New York, then there was no liability on the part of the surety from which the court could grant the equitable relief of exoneration.**

In the light of the fact that under the rule limiting the right to exoneration and particularly under the following statement in *Southwestern Surety Ins. Co.* v. *Wells*, 217 Fed. 294, to-wit:

> *"The limitations of the doctrine must not, however, be overlooked. The obligation of the surety to pay must have become absolute. To hold that because a surety may become involved he has an equity to be relieved would be to confer upon him the power to annul his own contract or suretyship."*

It follows that the liability of the surety must not only be absolute by virtue of the lapse of the time that matures the debt for which he is liable, but it must also be absolute and enforceable in the place in which he seeks relief. Otherwise, it is not an *existing* liability.

In other words, the limitation on the right to exoneration as it applies in point of time must necessarily also apply in point of space, or stated differently the liability must have accrued and it must be enforceable where the relief is sought. Hence, time and place must figure in determining whether or not the liability from which a surety seeks relief is a liability which is an existing one in the jurisdiction in which relief is sought.

The liability from which the surety sought relief herein did not exist in any jurisdiction, save and excepting the Western District of New York, by virtue of the provisions of Section 270, Title 40, U. S. C., for said statute conditions the right to enforce the liability by requiring that the suit shall be brought "in the name of the United States in the District Court of the United States in the district in which said contract was to be performed and executed, irrespective of the amount in controversy in such suit, and not elsewhere, for his or their use and benefit, against said contractor and his sureties, and to prosecute the same to final judgment and execution."

In other words, the United States consented that suit could be brought in its name for the benefit of persons supplying labor or materials against the surety and against the contractor on the bond only in the Western District of New York and the statute further provides that it shall not be brought elsewhere. Since the United States was a necessary party to this suit in the court below and since it had not consented that it should be sued in this sort of proceeding, it follows that the Congress contemplated that a surety could not be permitted to hamstring its principal by tying up the money which was

due from the government by proceedings such as this in any court, excepting the court wherein the liability of the surety could be enforced.

In 50 C. J. 245, it is said:

> "The form in which that protection may be secured is not material where the right to it exists and can be had without prejudice to the creditor. The creditor entitled to the debt for which the surety is liable should be made a party in order to receive payment from the principal, and the bill should allege that the surety is still liable for the debt."

The United States being a necessary party and it not having given its consent to be sued in the proceeding below demonstrates through the limitations imposed by the Act of Congress, to-wit: Section 270, *supra,* that plaintiff had no right to recover herein and that this action should never have been brought and that it should have been dismissed. Again had the United States been made a party or had the labor and materialmen been made parties they could not have recovered on the bond against the principal or surety thereon in the court below. This for the reason that Section 270, Tit. 40, U. S. C. A., provides that the only court having jurisdiction to grant such relief is the District Court of the United States in the district in which said contract was to be performed "and not elsewhere." Hence, the court below could not grant relief to the creditors on the bond and they could not be compelled to take substituted relief.

It is doubtful whether or not the laborers and materialmen could in a legal sense have been parties to this suit for the reason that the obligee in the bond

was the United States. Both the construction company and the plaintiff, by the terms of the bond "are held and firmly bound unto the United States of America, hereinafter called the 'Government'" (Tr. 61-62).

No other obligee is nominated in the bond.

In *United States Fidelity & G. Co.* v. *United States*, 204 U. S. 349, 51 L. Ed. 516, it was held that the United States is the real and not merely the nominal plaintiff in a suit authorized by the act of Congress in question to be brought in its name for the use and benefit of the materialmen upon the bond of a contractor for a public work, which the statute required should contain the specific special obligation directly to the United States, that the contractor shall promptly make payments to all persons supplying him labor and materials in the prosecution of the work. Said the court:

> "The United States is not here a merely nominal or formal party. It has the legal right, was a principal party to the contract, and, in view of the words of the statute, may be said to have an interest in the performance of all its provisions."
>
> • • • • • • •
>
> "* * * the statute required that, in addition to a penal bond in the usual form, one should be taken that would contain the specific, special obligation directly to the United States that the contractor or contractors 'shall promply make payments to all persons supplying him or them labor and materials in the prosecution of the work.' The government is a real party here."
>
> • • • • • • •

> "* * * the United States is a real, and not a mere nominal, plaintiff in the present action."

The opinion in that case had to do with the contract entered into before the amendment of the statute in 1905. The court held that its view that the United States was a real party and not a nominal party was strengthened by the Act of 1905, providing that after the completion of the contract, the person supplying labor or material to the contractor:

> "* * * shall have a right of action, and shall be and are hereby authorized to bring suit in the name of the United States in the Circuit Court of the United States in the district in which said contract was to be performed and executed, *irrespective of the amount in controversy in such suit*, and not elsewhere, for his or their use and benefit, against said contractor and his sureties, and to prosecute the same to final judgment and execution."

The court further said that the Statute of 1905:

> "* * * tends to sustain the view based on the latter act, namely, that, in suits brought in the name of the government for their benefit, the United States is a real litigant, not a mere nominal party."

From the foregoing, it follows that the United States was the creditor who should have been made a party to the use of persons supplying labor and material. But under the rule stated in *Maryland Casualty Co.* v. *Charleston Lead Works*, 24 F. (2d) 836, the United States has not consented to be sued in the court below in this sort of case. Hence, the court

below, as it was outside the district where the contract was performed, did not have and never could have jurisdiction to grant the relief of exoneration under the existing laws.

In the opinion below it is said: "—there can be no exoneration except from *an existing liability against the surety.*" This is also the result of the cases as we read them. But a statute (40 U. S. C. A., Sec. 270) controls the *beginning of the liability of the surety.*

• • • • • • • •

> "This statute has been construed to the effect that there is no *liability or cause of action against the surety until the expiration* of the six months period mentioned."

By virtue of that statute there could be no existing liability in the Western District of Missouri on the bond to any creditor. The liability could not exist save and excepting on the conditions named in the statute. In *Texas Cement Company* v. *McCord,* 233 U. S. 157, the court said:

> "The act does not place a limitation upon a cause of action theretofore existing, but creates a new one upon the terms named in the statute. The right of action given to creditors is specifically conditioned upon the fact that no suit shall be brought within the six months named, for it is only in that event that the creditors shall have a right of action and may bring a suit in the manner provided. The statute thus creates a new liability and gives a special remedy for it, and upon well settled principles the limitations upon such liability become a part of the right conferred and compliance with them is made essential to the assertion and benefit of the liability itself."

In *Metropolitan Surety Company*, 211 N. Y. 107, it is said:

> "The claimant could reach the surety company *through the bond alone*, which with the statute a part of it, defines and limits the rights of the claimant as against it, and the methods *and tribunals* through which those rights might be enforced. This right of action against it through any form of legal proceeding was created by the bond and the statute and must be enforced pursuant to the terms and conditions of the statute and *not otherwise*. * * * It was, however, a qualified and conditional, and not an absolute right or cause of action. An Act of Congress which at the same time and in itself authorizes or creates a new cause of action and prescribes the limitations thereof and of its enforcement makes these limitations conditions of the liability itself. Such an act is not a statute of limitations, and a compliance with the conditions which it prescribes is indispensable to the enforcement of the right it creates, because they are parts of or elements in the right itself and not limitations of the remedy only. The limitation of the remedy is a limitation to the right."

The liability of the surety on the bond could arise only after the six-months period and could be enforced only in the "United States Court of the district in which said contract was to be performed and executed * * * and not elsewhere" so that the surety could not be liable on the bond "elsewhere." It is said that "elsewhere" may be somewhere east of Suez, but there could be no liability on the bond in any place known as "elsewhere." It could exist only in the district where the "contract was to be performed and executed." It may be therefore that after the cause of action accrued the

surety could have exoneration in any court in that district, state or federal, because the liability would *exist* therein. But according to the statute the liability on the bond could not exist or be enforced "elsewhere." Hence the right to exoneration could neither exist nor be enforced "elsewhere."

## XIII.

**Plaintiff's suit was brought before a cause of action accrued and should have been dismissed.**

> "A demurrer will be to a bill which appears on its face to have been filed prematurely, before plaintiff became entitled to enforce his right."
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> 21 C. J. 437.
>
> *Kryptok* v. *Housmann & Co.*, 216 Fed. 267.
>
> *Texas Portland Cement Co.* v. *McCord et al.*, 233 U. S. 157.

In *American Bonding & Trust Company* v. *Gibson County*, 145 Fed. 871, the late Mr. Justice Lurton wrote a terse, learned dissertation upon the question here presented. Under that authority the trial court should dismiss a case prematurely brought when no cause of action has yet accrued. The syllabi in that case are as follows:

> 1. A plaintiff's right to recover depends upon his *right at the inception of the suit*, and the nonexistence of a cause of action when the suit was begun is a fatal defect, which cannot be cured by the accrual of a cause of action pending suit.
>
> 2. Where a judgment against a building contractor and his surety was reversed because of the failure of the plaintiff to allege or prove that its claim had been audited and certified by the architect, which, under the terms of the contract, was essential to give a right of action, or that such cer-

tificate had been wrongfully refused, the action could not be sustained upon an amendment of the declaration showing that such certificate was procured after the reversal, but without alleging that it had previously been refused.

In this case there was an agreement between the contractor and Gibson County to the effect that the claim should be audited and certified by the architect before a cause of action could accrue. Said the court (l. c. 873):

> "The plain meaning of that part of Article 5 of the agreement applicable to the facts of this case was that the contractors and their surety should only be liable for the expense of finishing the building, and for the damages provided for delay due to the default of the contractor when such cost and damage over and above the contract price should be audited and certified by the architect. Until that was done, no right of action under the fifth clause of the contract accrued, and this construction of the contract was the law of the case from which the court below was not authorized to depart.
>
> "Plaintiff's suit was prematurely brought, and no amendment declaring upon a cause of action which did not exist when the suit was commenced would cure such a defect. If no cause of action existed when the suit was started there was nothing to amend, and when this fact appeared, and objection was made, the suit should have been dismissed without prejudice to an action upon the cause of action which did accrue when the architect audited the claim. It was not a case of a cause of action defectively stated. Such a defect is amendable. Neither was it a case of a new cause of action brought in by amendment, which existed when the suit was brought. It was an effort to declare and recover upon a cause of action which arose pending the suit.
>
> "Plaintiff's right to any recovery depended upon its right at the inception of the suit, and the

nonexistence of a cause of action when the suit was started is a fatal defect, which cannot be cured by the accrual of a cause pending suit. *De Mattos* v. *Jordon*, (Wash. Dec. 6, 1898) 55 Pac. 118; *Hollingsworth* v. *Flint*, 101 U. S. 591, 596, 25 L. Ed. 1028; *Wadley* v. *Jones*, 55 Ga. 329; *Moon* v. *Johnson*, 14 S. C. 434; *Linn* v. *Scott*, 3 Tex. 67; *Wetherell* v. *Evarts*, 17 Vt. 219; *Jennings* v. *Zerr*, 48 Mo. App. 528; *Turner* v. *Pierce*, 31 Wis. 342; *Bell* v. *Bullion*, 2 Yerk. (Tenn.) 479; *Carter* v. *Turner*, 2 Head (Tenn.) 52; *Robinson* v. *Grubb*, 8 Baxt. (Tenn.) 19; *Pigue* v. *Young*, 85 Tenn. 263, 1 S. W. 889; *Blevins* v. *Alexander*, 4 Sneed (Tenn.) 588. In *Bell* v. *Bullion*, cited above, it was held that prematurity of suit was ground for arrest of judgment when the fact appeared upon the record. In *Carter* v. *Turner*, cited above, it was held to be a matter in abatement or demurrer according as the fact appeared or not upon the record. To the same effect are *Hovey* v. *Sebring*, 24 Mich. 232, 9 Am. Rep. 122; *Weirnwick* v. *Bender*, 33 Mo. 80; *Storm* v. *Livingston*, 6 Johns. (N. Y.) 45; *Dean* v. *Metropolitan R. Co.*, 119 N. Y. 540, 23 N. E. 1054; *Scott* v. *Fowler*, 14 Ark. 427; *Barnes* v. *Gibbs*, 31 N. J. L. 317, 86 Am. Dec. 210. When prematurity appears, the suit should be dismissed without prejudice to the right to institute a suit upon the cause of action when mature. 16 Ency. Pl. & Pr., p. 875; *Loomis* v. *Donovan*, 17 Ind. 198; *Durgee* v. *Turner*, 20 Md. App. 34; *Green* v. *De Moss*, 10 Humph. (Tenn.) 371, 377."

A somewhat similar case is that of *Eveland* v. *Detroit Machine Tool Co.*, 18 F. (2d) 986, where the court said (l. c. 969, 970):

"Although courts in general, and this court, should be, and are, liberal rather than strict in allowing amendments to pleadings in the furtherance of justice, yet it is a fundamental, essential element of an amendment to a declaration that such amendment

must relate to the time of, or prior to, the filing of such declaration. In the language of Judge Lurton, speaking for the court of appeals for this circuit, in *American Bonding & Trust Co.* v. *Gibson County*, 145 Fed. 871, at page 874 (7 Ann. Cas. 522): 'Plaintiff's right to any recovery depended upon its right at the inception of the suit, and the nonexistence of a cause of action when a suit was started is a fatal defect, which cannot be cured by the accrual of a cause pending suit.' *United States* v. *McCord*, 233 U. S. 157, 34 S. Ct. 550, 58 L. Ed. 893; *Emerson* v. *Hubbard*, (C. C.) 34 Fed. 327; *American Bonding & Trust Co.* v. *Gibson County, supra; Bush* v. *Pioneer Mining Co.*, 179 Fed. 78 (C. C. A. 9); *Mono County* v. *Flanigan*, 130 Cal. 105, 62 Pac. 293; *Correll* v. *Georgia Construction & Investment Co.*, 37 S. C. 444, 16 S. E. 156; 31 Cyc. 391; 1 Corpus Juris 1149.

"This principle is applicable not only to a case where the suit as originally commenced is not supported by any valid cause of action (*United States* v. *McCord, supra; American Bonding & Trust Co.* v. *Gibson County, supra*), but also to a case where, as here, it is sought to add, by amendment, a cause of action acquired by the plaintiff after the commencement of the suit to a cause of action on which such suit has already been commenced (*Mono County* v. *Flanigan, supra; Correll* v. *Georgia Construction & Investment Co., supra*), and specifically, to a case involving the same kind of a patent suit and situation as are presented here (*Emerson* v. *Hubbard, supra*). It may be added that this is not a case where the only effect of the amendment, if allowed and proved, is to perfect an inchoate, but not perfect, title asserted in the suit as originally commenced, and cases, and the principle therein involved, presenting that sort of a situation are not applicable here.

"For the reasons stated, the motion of plaintiff for leave to file the proposed amended declaration referred to must be denied."

XIV.

**A surety participating in the default of any person connected with the principal and suretyship relation forfeits all right to relief of any kind.**

The authorities below state the applicable principle:

*Broussard* v. *Wasson*, 187 M. A. 281, 173 S. W. 698.

*Eshleman* v. *Bolerius*, 144 Pa. 269, 22 A. 758.

*Block* v. *Estes*, 92 Mo. 318, 4 S. W. 731.

*Crisfield* v. *Murdock*, 127 N. Y. 315, 27 N. E. 1046.

*Wilder* v. *Butterfield*, 50 How. Pr. 385.

*McCrory* v. *Parks*, 18 Oh. St. 1.

*In re Koch*, 148 Wis. 548, 134 N. W. 663.

XV.

**Plaintiff's reply asserted that the only purpose of its complaint was to have the contract specifically performed. This was a solemn admission of record withdrawing its claims for all other relief and was binding on the court and hence the decree of the trial court granting exoneration was based upon an abandoned issue and is therefore outside the issues and is void.**

*Reynolds* v. *Stockton*, 140 U. S. 254, 35 Law Edition 464.

*Munday* v. *Vail*, 34 N. J. L. 418.

Both cases say:

"* * * a decree in equity, which is entirely aside of the issue in the record, is invalid, and will be treated as a nullity, even in a collateral proceeding."

XVI.

**Even if Exhibit "A" had constituted the entire contract between the parties yet since the uncontradicted evidence established that the decree of the trial court and the judgment of the circuit court of appeals both tied up all the assets of the construction company and prevented it from recovering claims against defaulting subcontractors and their bonding companies in the sum of approximately $42,000.00 and prevented it from making a defense against excessive claims the decrees in both courts were harsh and oppressive and inequitable and cannot stand.**

It is undenied that the decree of exoneration granted by the trial court and the decree of specific performance specified in the opinion and decision of the circuit court of appeals has heretofore operated and in the future will operate to deprive the Morley Construction Company of its right to enforce claims amounting to $42,000.00 against subcontractors and their sureties. The decisions of both the lower courts ignore the limitations on the discretion of courts of equity, especially with reference to the harsh or oppressive effect of a decree of specific performance or exoneration.

In *Caldwell* v. *Ins. Co.*, 124 Tenn. 593, it is said:

> "The remedy of specific performance is governed by the same rules which control the administration of other equitable remedies; the right to it depends upon elements, conditions and instances, which equity regards as essential to its peculiar modes of relief. He who seeks equity must do equity, and he who comes into equity must come with clean hands. The contract must be perfectly fair, equal and just in its terms and in its circum-

stances. The contract and situation of the parties must be such that the remedy of specific performance will *not be harsh or oppressive.*''

In 58 C. J. 850, it is said:

> ''* * * remedy must not be harsh in its operation on defendant or others'' (citing *Willard* v. *Tayloe,* 8 Wall. 557, 19 L. Ed. 501).

In *Willard* v. *Tayloe,* this court said:

> ''It is true the cases cited, in which the discretion of the court is asserted, arose upon contracts in which there existed some inequality or unfairness in the terms, by reason of which injustice would have followed a specific performance. But the same discretion is exercised where the contract is fair in its terms, if its enforcement, from subsequent events, or even from collateral circumstances, *would work hardship or injustice to either of the parties* * * *
>
> The discretion which may be exercised in this class of cases is not an arbitrary or capricious one, depending upon the mere pleasure of the court, but one which is controlled by the established doctrines and settled principles of equity. No positive rule can be laid down by which the action of the court can be determined in all cases. In general it may be said that the specific relief will be granted when it is apparent, from a view of all the circumstances of the particular case, that it will subserve the ends of justice; *and that it will be withheld when, from a like view, it appears that it will produce hardship or injustice to either of the parties.*''

The trial court and the circuit court of appeals wholly ignored the right of the defendant construction company to recover from the defaulting bonding companies and subcontractors. It thus appears that the courts below determined to find for the respondent un-

der any and all circumstances doubtless upon the theory that the same rule should be applied which would apply to protect a voluntary surety who received no consideration for the contract of suretyship, but herein the defendant was a compensated surety. It sold its credit to the contractor for a consideration and then withdrew that credit at the very time that the contractor needed it and consequently it breached its contract of suretyship. Had the surety not violated its contract of suretyship by bringing those suits, then there cannot be any question that as stated by the evidence on record pages 107-108 they would have, if permitted by the surety, utilized their resources to take care of all their obligations and it appears on said pages that it was necessary for the construction company to be permitted to prosecute its claims against these defaulting casualty companies and subcontractors in order to take care of its obligations as principal for the laborers and materialmen and so if ever there was an instance in which a decree of specific performance or what was tantamount to the same—the decree of exoneration operated harshly, inequitably and unjustly.

XVII.

**The circuit court of appeals not only appropriated to itself the discretion which belongs to the trial judge but it also declined to follow the general rule on the subject which prohibits a court of equity as well as a court of law from exercising any discretion whatsoever with reference to the ultimate property rights of a litigant.**

In *Hennessey* v. *Carmony,* 50 N. J. Equity 616, l. c. 625, Vice Chancellor Pitney, later a justice of this court, said:

> "If by 'discretion' is here meant that the judge must be discreet, and must act *with* discretion, and discriminate, and take into consideration and give weight to each circumstance in the case, in accordance with its actual value in a court of equity, then I say that that is just what he must do in every case that comes under his consideration—no more and no less. And that is the sense in which I understand the word is used in *Demarest* v. *Wardham*. But if the word 'discretion' in this connection is used in its secondary sense, and by it is meant that the chancellor has the liberty and power of acting, in finally settling property rights, *at* his discretion, without the restraint of the legal or equitable rules governing these rights, then I deny such power. It seems to me that the true scope of the exercise of this latter sort of discretion in the judicial field is found in those matters which affect procedure merely, and not the ultimate right."

The opinion and judgment of the circuit court of appeals is in conflict with the principles stated by Mr. Justice Pitney in the above opinion which properly states the general law on the question and discloses a conflict between the opinion of the circuit court of appeals and the general law, and therefore, necessitates a reversal of the judgment of the circuit court of appeals.

Section 35 of Pomeroy's Specific Performance of Contracts says:

> "The granting of this equitable remedy is a matter of discretion; not, indeed, of an arbitrary capricious discretion, synonymous with the mere pleasure of the judge, but a sound, judicial discretion controlled by established principles of equity, and exercised upon a consideration of all the circumstances of each particular case."

In *Willard* v. *Tayloe*, 8 Wall. 557, the court said:

> "The discretion which may be exercised in this class of cases is not an arbitrary and capricious one depending upon the mere pleasure of the court, but one which is controlled by the established doctrines and principles of equity."

XVIII.

**Even if Exhibit "A" were held to be the entire contract, yet its purpose had been accomplished when the building was completed and hence there was no necessity for a decree of specific performance.**

The only purpose of Exhibit "A" is that shown therein (Rec. 10, 12). And also that shown in Record 12 and Record 13 and 77, 78. These documents in themselves disclose that because of the failure of the subcontractors to perform due to strikes and labor troubles, that the construction company needed assistance merely to help it take care of the plastering contract. The agreement was made to take care of that, only and to vest a property interest in the claim against the government contrary to the statute, R. S. 3777. It did not extend to laborers or materialmen in general. Exhibits "A" and "B" make no mention of any other purpose. In determining what is meant by parties to an agreement, the apparent purpose must be considered. *Van Sickle* v. *Arsuaga*, 231 U. S. 601; *Mobile, et cetera, Oil Company* v. *Jurey*, 111 U. S. 584, 240 West. 358. The court of appeals in its opinion thus interprets Exhibit "A" for it says (Rec. 133):

> "The contract, Exhibit 'A,' was entered into for the purpose of extricating the defendant, Morley Construction Company, from financial difficulties in connection with the construction contract, and for

> completing the construction contract. This was the purpose of establishing the joint account provided for in Exhibit 'A.' *This purpose was accomplished.* The *construction contract was completed* to the satisfaction of the United States Government, and final payment ordered."

In view of the foregoing finding by the circuit court of appeals to the effect that Exhibit "A" was entered into only with reference to the *construction* feature of the contract and not with reference to the feature of the performance having to do with promptly making payment to laborers and materialmen, it is difficult to understand how the court of appeals could have determined that the Maryland Casualty Company was entitled to a decree directing the trial judge to decree specific performance of a contract which had already been performed. If Exhibit "A" was for the purpose of completing the construction contract, and if this purpose was accomplished, then it would have been a wasteful and ridiculous excess to go further. It was wholly unnecessary to give the Maryland Casualty Company the benefit of the extraordinary relief of specific performance, especially in the light of the fact that the construction company had no officer or agent at Buffalo, New York, and in the light of the fact that it was necessary in the disbursement of the fund to have the construction company officials exercise their discretion with reference to the payment of all bills.

A reversal with appropriate directions is again prayed.

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